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# **THE PROTECTION OF WILDLIFE HABITATS FROM HARMFUL DEVELOPMENT VIA LEGAL AND REGULATORY PROCESSES**

**by Kevin Richard Ross, University of Durham**

Almost fifty years since the introduction of official habitat protection and systematic town and country planning, wildlife habitats continue to suffer damage and destruction from development. In focusing upon development threat, this paper embraces the interaction between habitat protection law and the planning mechanism.

This thesis aims to evaluate the role of legal and regulatory processes in protecting habitats from harmful development. After exploring the historical and political development of this field, current law and regulations are explained, and critically assessed. Consideration is then given to the operation of this protective regime in practice. Cases selected from the planning registers of two local planning authorities, and supported by other high profile planning cases from around the UK, are assessed to ascertain the weight attached to ecology in the consideration of planning applications. The thesis then turns to the enforcement process; two detailed studies facilitating investigation of this. Both cases concern development threats to habitats of international importance. Cardiff Bay Barrage focuses upon the role of the European Commission in enforcing Community law; Lappel Bank is the subject of litigation on behalf of a voluntary conservationist plaintiff.

The main conclusion drawn is that wildlife habitats do not receive adequate protection from legal and regulatory processes vis-à-vis harmful development. The continuation of such a state of affairs will ultimately result in substantial losses of habitat types and species. However, the emergence of European environmental law, and the continued growth of voluntary organisations prepared to intervene in this field, give cause for optimism.



1 DEC 1998

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## Chapter 1

# INTRODUCTION

### **Preface**

Nature conservation is now well established as a legitimate aim of government and a popular avenue of recreation; it forms the basis of this research. I trust the following exordium will provide justification for this, and indeed outline the focus of the paper in more detail.

The underlying premise of this work is that flora and fauna ought to be afforded legal protection in their own right. Mankind is not entitled to bring about the unnatural extinction of species; a process which, if continued, will severely restrict future evolution. Fewer types of organism subject to evolutionary pressures must ultimately result in less genetic material being available for evolutionary development; mankind cannot be insulated from such loss.<sup>1</sup>

The essential factor in wildlife conservation is the protection of habitats. Indeed Stiling,<sup>2</sup> in investigating the causes of recent extinction on a global scale, found that habitat destruction came second only to introduced species<sup>3</sup> in the list of causal factors. Accordingly, in evaluating the protection of wildlife, this paper focuses upon threats to habitats; in particular land development.

### **Ambit of Research**

The present century has witnessed an intensification of habitat destruction. Whilst protective provisions have had a degree of success, habitats continue to suffer from development pressure -- as the large road building programme and urban fringe expansion of recent years testify. New roads by their nature often

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<sup>1</sup> N.W. Moore, *The Bird of Time: the science and politics of nature conservation*, Cambridge: Cambridge University Press, 1987, p.8.

<sup>2</sup> P. Stiling, *Ecology: Theories and Applications* - 2nd Edition, New Jersey: Prentice Hall International, Inc., 1996.

<sup>3</sup> There are strict controls on the introduction of wild species to the UK; see s.14(1) Wildlife and Countryside Act 1981 (WACA 1981).

result in fragmentation of habitats, damage that is often exacerbated by the attraction of new businesses contributing to 'ribbon development' along the routes themselves. Also, increased demand for recreation and a growing appreciation that the countryside has potential for meeting this has further fuelled habitat damage. Recreational pressure can ultimately lead to problems from vandalism and disturbance, as well as the loss of habitat to tourist developments. Habitats may also fall victim to other economic initiatives, such as port expansion or housing development. Destruction in such cases is usually absolute, and cannot continue indefinitely without an irreversible loss in the diversity of wildlife.

The ambit is a narrow one; the protection of individual specimens, and indirect measures such as anti-pollution provisions -- both of which are important elements of conservation law -- are excluded. The research investigates the protection of habitats, including domestically and European designated sites, from development. Ultimately, the planning system's treatment of the ecological significance of land -- the interaction between wildlife law and planning -- is the focal point of this paper. Continuing loss of habitat to development justifies this focus, and ensures that it proceeds upon an assumption that current protection is inadequate. This research will evaluate how well the legal and regulatory processes operate in this field. Enforcement is a potential weakness, as environmental issues do not fit easily into traditional rights-based litigation and complaints models; particular attention is therefore paid to this process.

### **The Inadequacy of Habitat Protection Law**

The reality that almost all habitats are the product of man's interference in the natural world, and therefore require continued management to preserve them, is reflected in the significance accorded to management agreements by conservation law. Land management is no longer the main source of habitat threat. However, this position is undermined by there being little in law to prevent such well-managed habitats succumbing to development. As this paper demonstrates, even those habitats sufficiently important to qualify for the most rigorous legal protection remain at risk.



It is impossible to secure, via legal means, preservation of land *ad infinitum*; this is so in every context, not just nature conservation. Thus, in examining the ultimate efficacy of protection law we must investigate the planning mechanism's accommodation of the various protective designations of habitat. I submit that insufficient weight is attached to the ecological significance of land within the planning process. As this is so with internationally significant habitats, it follows that sites of mere national importance -- *a fortiori* habitats without designation -- are particularly under-protected. The latter point is significant; we neglect common habitats at our peril, and risk making scarce that which hitherto was in abundance.

In the absence of a doctrine of inviolability of land, conservation policy is trammelled with the inevitability of compromise within planning decisions. Continued deterioration and loss of habitat, particularly on a crowded and avaricious Isle such as Britain, are assured under law that accommodates economic ascendancy. With habitat loss having continued in Britain for such a sustained period, the time has long since passed when compromise could justifiably be a feature of development considerations over protected sites.

The message of this paper is that insufficient significance is accorded to the ecological importance of land by the current legal and planning systems. There is a case for nature conservation law to be strengthened so that it may be genuinely capable of satisfying its designs.

## **Methodology**

The research question demands an objective analysis of planning decisions in which wildlife habitat is an issue. Two approaches have been adopted: assessment of a range of cases from Wear Valley District Council, Co. Durham and the Peak Park Planning Board, Derbyshire; and detailed study of two internationally important cases.

The former approach focused upon the salient considerations behind planning outcomes; in particular the weight attached to ecological factors. Whilst this inevitably touches upon social and political issues, these go to the foundation of

the local planning process and ultimately the merits of habitat protection law placing faith in the planning system. Both legally designated and non-designated habitats were covered, in order to detect any discernible difference in the treatment of statutory protected sites and other habitats. Additionally, focus upon a national park authority and local planning authority sought to expose differences in approach to conservation between the two types of organisation. This was supplemented by reference to other UK planning decisions, selected to illustrate particular aspects of the legal and regulatory processes. Official and voluntary conservation organisations, refereed journals and newspapers were also utilised for this purpose.

The main body of research is concerned with two detailed case studies -- both internationally important habitats -- that facilitate investigation of the enforcement process. Lappel Bank, a case that progressed to the European Court of Justice (ECJ), provides the basis for critical assessment of the challenge and appeal process from the perspective of the plaintiff voluntary organisation. Cardiff Bay Barrage, where government support ensured the usual planning controls were avoided, allows an assessment of European Commission law enforcement. Detailed analysis of the case studies demanded a more broad-based approach than that appropriate to the range of planning authority decisions. Primary sources for Cardiff Bay Barrage included documents held by Cardiff Bay Development Corporation (CBDC) and the Cardiff Central Library; in respect of Lappel Bank access was gained to papers held by RSPB solicitors. Both studies also relied on law reports, Hansard, press releases and articles in newspapers and journals.

## **Conclusion**

The foregoing summarises the focal points of this work, and gives some indication as to why the project is pertinent.

The limits of space and time necessarily ensure that the ambit of this study is narrow. The field chosen is topical, and one in which much conflict is apparent. I am confident it succeeds in demonstrating the shortfalls of the legal and regulatory processes in protecting wildlife habitats from harmful development.

Such a study cannot be insulated from policy considerations behind the law, and a full understanding of policy here requires awareness of the historical development of conservation and planning. This is the purpose of the following chapter.

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## Chapter 2:

# **HISTORICAL PERSPECTIVE**

### **Introduction**

This chapter places the current habitat protection code within its historical context, demonstrating the evolution of the conservation and planning relationship. The origin of this relationship can be traced to the pressure for land use planning that emerged during the inter-war years -- this period will be the starting point for the discussion.

By focusing upon prevailing philosophies, I will demonstrate the policy influences and social context that have ultimately delivered the current law. Accordingly, there is little emphasis upon actual legal provisions. However, the official reports that preceded legislation are referred to, as these provide insight into the rationale that guided Parliament. Essentially, each epoch of prevailing ideology is discussed in terms of its influence upon the development of nature conservation and planning law.

In particular, the demand for planning and countryside preservation, both in terms of inter-war emergence and post-war activity, will be discussed. The link between nature conservation and amenity will also be explored, as this is a fundamental element of the conservation/planning relationship. Finally, the prominence of private property rights within the planning ambit, as a feature of 1980s and 1990s official policy, brings us to the present day.

However, emphasis upon philosophical development precludes discussion according to a strict chronological pattern -- the tendency for ideologies to repeat and coincide over time militating against such treatment. The links between conservation and planning will therefore be explored without undue constraint by chronology. This analysis will ultimately assist in a fair and topical evaluation of the current law -- which is the principal aim of this paper.

## Habitat Destruction and the Need for Formal Planning

Only during the early twentieth century did the management of habitats as reserves, as opposed to efforts merely protecting individual specimens, attain serious credibility.<sup>4</sup> Nor was the link between habitat protection and wildlife conservation widely accepted until destruction of habitats reached a substantial scale. Thus a heightened appreciation of wildlife reserves' value became apparent during the inter-war years, stimulated by the loss of habitat through changes in land use and management.<sup>5</sup> This was accompanied by a shift in the conservation role of those reserves that already existed, away from protection of individual examples and towards the preservation of total resources.<sup>6</sup>

The crucial importance of habitat to nature conservation ensured that the latter was a factor in the land use and planning debates of the early to mid twentieth century. Like other resources, the countryside had suffered from the absence of a systematic approach to land use during the inter-war years. In particular, the period of agricultural depression following the break-down of the great estate system compounded the lack of effective planning controls -- much agricultural land was sold for development.<sup>7</sup> This was the catalyst for the urban sprawl that characterised the 1930s; with up to 25,000ha.<sup>8</sup> of farmland absorbed each year by urban growth.

It was widely felt that urban growth could be tackled on a regional basis and was thus an appropriate focus for regional town planning schemes.<sup>9</sup> However, the period also witnessed a major shift in Britain's industrial power, with many

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<sup>4</sup> J. Sheail, *Seventy-Five Years in Ecology: The British Ecological Society*, Oxford: Blackwell Scientific Publications, 1987, see p.131.

<sup>5</sup> J. Sheail, *Nature in Trust The history of nature conservation in Britain*, Glasgow: Blackie and Son Ltd., 1976 @ p.55.

<sup>6</sup> N.W. Moore, *op. cit.*, p.69

<sup>7</sup> J. Blunden, N. Curry, T. Burrell, G. Smart, R. Smith & R. Steele; *A People's Charter? Forty Years of the National Parks and Access to the Countryside Act 1949*, London: HMSO, 1990, p.17.

<sup>8</sup> P. McAuslan, *Land, law and planning cases, materials and text*, London: Weidenfeld & Nicolson, 1975, p.3.

<sup>9</sup> G. E. Cherry, *The Evolution of British Town Planning. A history of town planning in the United Kingdom during the 20th Century and of the Royal Town Planning Institute, 1914-74*, Leighton Buzzard: Leonard Hill Books, 1974, p.88.

traditional areas suffering from severe depression.<sup>10</sup> Such conditions were far from conducive to detailed systematic planning, much less habitat conservation, occupying a prominent position in government priorities. The problems flowing from the 'uncontrolled fusion'<sup>11</sup> of town and country eventually drew an official response: the 'Report of the Royal Commission on the Geographical Distribution of the Industrial Population'.<sup>12</sup> The Royal Commission recommended action to militate against the trend to large conurbations and highlighted 'The evils attendant on haphazard and ill-regulated town growth'.<sup>13</sup> The huge loss of agricultural land was lamented; though the Commission recognised that the countryside additionally represents '...amenities and recreational opportunities,...precious possessions for fostering and enriching the nation's well-being and vitality'.<sup>14</sup>

The proposed planning system was seen as essential to achieving a more systematic model of land use, and ensuring appropriate balance between competing interests. Whilst expansion into the countryside was a means by which the social problems of urban intensification could be mitigated, it was also important to ensure that some rural land was preserved, both for the salubrity of agriculture and in response to the public demand for greater recreational outlet.

The calls for planning reform went unheeded during the inter-war years -- advocates of systematic planning would have to wait until after the second world war before such a system was operative. It has been suggested<sup>15</sup> that this was because the degree of perceived damage to the countryside remained insufficient to justify significant positive action, at a time when the preservation movement lacked popular appeal. It was certainly the case that town and country planning,

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<sup>10</sup> A. E. Telling, *Planning Law and Procedure*, 7th edition, London: Butterworths, 1986, p.7.

<sup>11</sup> D.L. Foley, 'British Town Planning: One Ideology or Three?' *British Journal of Sociology* Vol. 2, London: Routledge & Kegan Paul Ltd, 1960, 211 @ p.221.

<sup>12</sup> Cmnd. 6153, 1940; [HC Sessional - 1939-40 (4) 263]; known as 'The Barlow Report'.

<sup>13</sup> *Ibid* p.10.

<sup>14</sup> *Ibid* p.15.

<sup>15</sup> J. Sheail, *Seventy-Five Years in Ecology: The British Ecological Society*, Oxford: Blackwell Scientific Publications, 1987, p.132.

as it then was, remained insufficiently developed for any effective action to take place; whether there was significant support for it or not.<sup>16</sup>

### **Planning in the Reconstruction Context**

Peace in 1945 provided an opportunity to commit resources to civil matters - in particular rebuilding bombed cities. This facilitated formal planning for what would ultimately be a greatly improved environment. As Ashworth<sup>17</sup> says, such plans not unnaturally endeavoured to improve upon those weaknesses whose origin lay deeper than bomb damage. War had demonstrated the practical utility of centrally co-ordinated planning, and as Cherry<sup>18</sup> says, from this flowed a confidence that Britain could take the opportunity of reconstructing for the future via central intervention.

An important element of reconstruction concerned the preservation of the countryside from the type of ad hoc development witnessed during the 1930s. This became a feature of the national plan concept, which had gained widespread support immediately after the war. Serious consideration of a national plan was undertaken by Lord Reith, Minister of Works in Churchill's coalition government, largely as a response to the influential 'Barlow Report'.<sup>19</sup> This and the later 'Scott Report'<sup>20</sup> were undoubtedly influential in curbing harmful development. Their recommendations; including a national plan, a central planning authority and the extension of planning control across the entire country; would ultimately prove to be a crucial part of the reconstruction blueprint.

Barlow's non-interventionist ethos was reinforced by Scott. It was accepted that the proposed planning system would be sufficiently robust to reconcile rural conflicts and ultimately preserve the countryside.<sup>21</sup> Fears of an anticipated post-

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<sup>16</sup> G.E. Cherry; *Environmental Planning 1939-1969 Volume 2 National Parks and Recreation in the Countryside*, London: HMSO, 1975; @ pp.9-10.

<sup>17</sup> W. Ashworth, *The Genesis of Modern British Town Planning a study in economic and social history of the nineteenth and twentieth centuries*, London: Routledge & Kegan Paul Ltd., 1972, p.227.

<sup>18</sup> Op. cit, p.155.

<sup>19</sup> Cmnd. 6153, 1940; see p.13 above.

<sup>20</sup> Lord Justice Scott chaired the 'Committee on Land Utilisation in Rural Areas'; Cmnd. 6378, 1942 [HC Sessional - 1941-42 (4) 421].

<sup>21</sup> J. Blunden et al, op. cit p.42.

war building boom were clearly evident in Scott's warning that 'The future of the countryside will be profoundly affected whether on the one hand there is a continuation of the pre-war trend of industrial and urban development...[or] a dispersal of the large concentrations of population...-- in other words whether future constructional development is haphazard or planned.'<sup>22</sup>

It was only after the publication of the Scott Report in 1942 that general countryside preservation and the establishment of specific nature reserves were considered to be separate strands of the same issue, and '...kindred functions appropriate to a central planning authority.'<sup>23</sup> The policy that emerged from the reconstruction debates embraced the conservation of land. It sought to further the countryside as an amenity, and preserve good agricultural land for food production.

War time blockades had fuelled unease with our dependency on food imports, and highlighted the long-running tendency of indiscriminate transfer of agricultural land to other uses.<sup>24</sup> Additionally, agriculture was regarded as being entirely consistent with countryside preservation; as Scott<sup>25</sup> confirmed '...the cheapest way, indeed the only way, of preserving the countryside in anything like its traditional aspect would still be to farm it.' The prevailing philosophy acknowledged no contradiction between agricultural progress and efficiency, nor between rural amenity and the rural economy.<sup>26</sup> Agriculture accordingly benefited from special treatment after the war, with effective exemption from planning control.

However, this policy was criticised as being ecologically harmful, and indeed by the 1970s it was widely accepted<sup>27</sup> that agriculture represented the principal threat to wildlife. This realisation led to a shift in philosophy from which tighter controls and financial incentives served to temper the threat. As a result,

<sup>22</sup> Cmnd. 6378, 1942 @ p.39.

<sup>23</sup> 'Town and Country Planning 1943-51', Progress Report by the Minister of Local Government and Planning on the work of the Ministry of Town and Country Planning, Cmnd. 8204, 1951 [HC Sessional 1950/51, 133] @ p.155.

<sup>24</sup> W. Ashworth, loc. cit.

<sup>25</sup> Cmnd. 6378, 1942, @ p.47.

<sup>26</sup> I. Hodge, 'The Conservation of the Countryside', Town and Country Planning, Vol.66 No.5; London: The Town and Country Planning Association; May 1997, pp.133-135.

<sup>27</sup> See M. Shoard, *The Theft of the Countryside*, London: Temple Smith, 1980.



development -- for which there continues to be great demand -- has re-emerged as the foremost menace to habitats.

### **The Link With Amenity**

Amenity considerations have been instrumental in preserving land from development. It may be no coincidence that the inter-war years of rural destruction were accompanied by a period of renewed interest in the countryside, not least for recreational purposes. The creation in 1926 of the Council for the Preservation of Rural England<sup>28</sup> was a response to both phenomena. During this period, voluntary organisations concerned with landscape and wildlife increasingly sought to acquire land of their own with which to pursue their interests. However, maintenance of these sites, and others such as the Forest Parks initiated by the Forestry Commission in 1936,<sup>29</sup> was motivated not by any desire to protect wildlife per se; rather by a determination to gain further recreational access to the countryside. Except for limited specialist reserves, such as those of the RSPB, wildlife itself merely equated to a recreational resource.

The inherent bond between wildlife and amenity was explicitly acknowledged by the British Ecological Society (BES) in 1942, when its Committee declared the first object of nature preservation to be the '...maintenance for enjoyment by the people at large of the beauty and interest of characteristic British scenery.'<sup>30</sup> It is significant that nature conservation as an end in itself was not a tenet of the report; ecological values were decidedly subservient to the human benefits of having recourse to unspoilt countryside and nature. However, whatever the rationale behind conservation, the Committee acknowledged the already serious effects of increasing urbanisation and accepted the need to resolve the '...fundamental conflict between conservation on the one hand and development in its widest sense on the other.'<sup>31</sup>

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<sup>28</sup> Later to become The Council for the *Protection* of Rural England (CPRE).

<sup>29</sup> D. Evans, *A History of Nature Conservation in Britain* - 2nd edition, London: Routledge, 1997, p.57.

<sup>30</sup> BES, 'Nature Conservation and Nature Reserves', *Journal of Ecology* (32) 1944-45, Cambridge: Cambridge University Press, @ p.49.

<sup>31</sup> *Ibid*, @ p.52.

There have long been groups who support the preservation of wildlife for its own sake; the British Correlating Committee, who campaigned alongside the landscape and amenity organisations for legislation, being one example. However, during the inter-war years such organisations represented a relatively minor part of a wider conservation movement dominated by the amenity lobby. It was clear that naturalists' interests would be best served by co-operation with those representing amenity and outdoor recreation. Indeed, such a relationship is not unnatural; as Foley<sup>32</sup> says: 'The preservationists may find a covering rationale in the guise of amenity.'

The combined influence of wildlife and amenity groups eventually exerted sufficient pressure to influence government policy; the amenity lobby gaining the initial significant concession with the establishment of the National Park Committee<sup>33</sup> in September 1929. Chaired by Christopher Addison, this considered the feasibility of establishing national parks. Its terms of reference also included preservation, on a national scale, of flora and fauna; thus demonstrating the extent to which nature conservation was subsumed within the national parks and amenity debate. National parks were a very important aspect of post-war amenity considerations -- a means of refreshment for the four-fifths of England and Wales' population who were otherwise confined to an urban existence.<sup>34</sup> Lamenting the rapid progress in recent years of urbanisation, Addison averred that 'The preservation of what is beautiful and pleasant in both town and country is a practical measure which is essential to a right economy and to the national welfare, and there is no doubt that by the exercise of wise forethought the forms of development can be made less objectionable.'<sup>35</sup> The Committee summarised the general objectives satisfied by a system of national parks and nature reserves as the preservation of the countryside, improved recreational facilities and the protection of flora and fauna;<sup>36</sup> the order in which these objectives appear in the report is significant. Whilst nature sanctuaries could prevent interference, planning

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<sup>32</sup> D.L. Foley, *op. cit.* p.220.

<sup>33</sup> 'Report of the National Park Committee' Cmnd. 3851, 1931 [HC Sessional 1930/31 (16) 283].

<sup>34</sup> See 'Report of the National Parks Committee (England & Wales)' Cmnd. 7121, 1947 [HC Sessional 1946/47 (13) 303], p.8.

<sup>35</sup> Cmnd. 3851, 1931 @ p.9.

<sup>36</sup> *Ibid* pp.8-11.

would ensure the protection of the countryside from harmful development. Addison concluded<sup>37</sup> that planning powers could in many cases ensure preservation, and recommended that they be extended to all areas; irrespective of the likelihood of development.

Government responsibility for national parks as an amenity provision was an assumption made in a planning White Paper,<sup>38</sup> which called for the relief of urban congestion by providing open spaces. Indeed, an important role of government was '...the preservation of land for national parks and forests, and the assurance to the people of enjoyment of the sea and countryside in times of leisure.'<sup>39</sup> As a later Ministerial pronouncement confirmed,<sup>40</sup> the protection or enhancement of amenity is one of the main purposes of planning legislation.

During these halcyon days for amenity groups, nature conservation remained on the fringes of conservation policy. As Dower<sup>41</sup> said, despite the great voluntary efforts made, no national policy for wildlife conservation yet existed. Habitat protection efforts were almost entirely restricted to the maintenance of sites by well-established voluntary organisations such as the National Trust. That successes here were necessarily limited to certain areas and types of reserve further emphasised the increasing need for a national land use policy.<sup>42</sup> This was acknowledged by the BES,<sup>43</sup> which concluded that reliance upon voluntary bodies and private management of land for conservation would no longer be sufficient.

In 1945 the Nature Reserves Investigation Committee<sup>44</sup> (NRIC) proposed a comprehensive plan to protect remaining wildlife. It recognised that continued preservation was of concern to those who derived pleasure from observing wildlife, and proposed selecting sites for conservation; including a national system of nature reserves. Whilst clearly guided by amenity considerations, such

<sup>37</sup> Cmnd. 3851, 1931 @ p.39.

<sup>38</sup> 'The Control of Land Use' Cmnd. 6537, 1944; [HC Sessional 1943/44 (8) 273], see p.9.

<sup>39</sup> Ibid @ p.3.

<sup>40</sup> Cmnd. 8204, 1951; op. cit @ p.138.

<sup>41</sup> J. Dower, 'National Parks in England and Wales', Cmnd. 6628, 1945, [HC Sessional 1944/45 (5) 283], p.40.

<sup>42</sup> J. Sheail, *Nature in Trust The history of nature conservation in Britain*, Glasgow: Blackie and Son Ltd., 1976, p.88.

<sup>43</sup> BES op. cit @ p.65

<sup>44</sup> NRIC, 'National Nature Reserves and Conservation Areas in England and Wales', London: The Society for the Promotion of Nature Reserves, 1945.

measures would provide ecologists with an opportunity to promote the scientific aspect of conservation. It was important that formal responsibility for nature conservation was accepted by government, and this was the main conclusion reached by the Committee.

In August 1945 Sir Arthur Hobhouse<sup>45</sup> appointed Dr. Julian Huxley to chair 'The Wildlife Conservation Special Committee'.<sup>46</sup> Huxley believed that wildlife sanctuaries should form an important element of the wider national parks question, and recommended that each national park should contain nature reserves as an addition to its amenities.<sup>47</sup> He proposed to designate a small number of important sites for direct management by a 'biological service'. These 'national reserves' would represent a series of typical habitats -- 'Considered as a single system, the reserves should comprise as large a sample as possible of all the many different groups of living organisms...'<sup>48</sup> Although a national scheme, the reserves would cover less than 0.002<sup>49</sup> of the surface of England and Wales -- the small scale reflecting the fact that direct control would effectively preclude economic development. The proposed network represented '...the minimum number of sites compatible with the formulation of a coherent and workable scheme'; which was itself designed '...to secure a balanced representation of the different major types of plant and animal communities existing in England and Wales...'<sup>50</sup> This concept of a national network was very important; in its entirety it would protect not just the most important habitat types, but examples across the entire spectrum of native wildlife. Therefore, the choice of sites was not dominated by considerations of scarcity, rather by a desire to protect a representative series of habitats. The national scheme would be supplemented by powers of local authorities to establish and maintain 'local nature reserves' (LNRs),<sup>51</sup> thus extending potentially strict protection to locally significant habitats.

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<sup>45</sup> Who chaired the National Parks Committee (England & Wales); Cmnd. 7121, 1947.

<sup>46</sup> Wildlife Conservation Special Committee (England & Wales), 'Conservation of Nature in England and Wales'; Cmnd. 7122, 1947, [HC Sessional 1946/47(14) 535].

<sup>47</sup> Ibid @ p.10.

<sup>48</sup> Ibid @ p.17.

<sup>49</sup> Ibid @ p.16.

<sup>50</sup> Ibid @ p.49.

<sup>51</sup> Ibid @ p.33.

A further recommendation was that sites of special scientific importance lying outside the national reserves be protected; not via direct control but by listing, so that they could be taken into account by local planning authorities. Thus, protection here would rely upon the new planning mechanism. However, Huxley emphasised that 'It is not suggested that the existence of any such site should hold up plans for development, but that there should be machinery by which its existence could be made known at the earliest stage of planning so that such action as may be possible can be taken for its protection.'<sup>52</sup> Designation was therefore the means by which the ecological significance of habitats could be accommodated by planning authorities; so that a decision on proposed development would take into account the scientific importance of the land. There was clearly an assumption in this recommendation that the new planning system would be equal to the task of respecting ecological importance.

Huxley's biological service,<sup>53</sup> regarded by Hobhouse<sup>54</sup> as his most important proposal, would assist in habitat protection by making representations and providing advice to local planning authorities. Being in the public interest, nature conservation was a legitimate concern of the newly created planning mechanism; the Committee urged that nature conservation be recognised as a land use for planning purposes.<sup>55</sup> The importance of the planning/conservation link was repeatedly emphasised by Huxley; 'Apart from the direct ownership or management by the State of selected areas, the greatest need in the conservation of nature is the recognition of its importance in the framing and exercise of any general planning powers for land use'.<sup>56</sup> This axiom lies at the root of the site designation concept, and indeed is the means by which the majority of habitats, whether classified domestically or under European law, are protected.

In urging government acceptance of a general responsibility for wildlife conservation,<sup>57</sup> Huxley echoed previous calls by the NRIC.<sup>58</sup> However, W. S.

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<sup>52</sup> Cmnd 7122, 1947 @ p.69.

<sup>53</sup> Ibid @ p.53.

<sup>54</sup> Cmnd. 7121, 1947; p.59.

<sup>55</sup> Cmnd. 7122, 1947; p.74.

<sup>56</sup> Ibid @ p.73.

<sup>57</sup> Ibid @ p.52.

<sup>58</sup> See above; p.19.

Morrison, Minister for Town and Country Planning, had in 1943<sup>59</sup> confirmed that the government accepted recommendations on the preservation of rural amenities and provision of improved access to the countryside; which necessarily involved wildlife.

In April 1948<sup>60</sup> Herbert Morrison, Lord President of the Council, confirmed that the government accepted the recommendations of Huxley. There followed legislation that addressed nature conservation at a national level and founded the link with planning; the National Parks and Access to the Countryside Act 1949 (NPACA 1949) was enacted in the 1948-49 session. The Nature Conservancy (NC), the biological service advocated by Huxley, was duly established in November 1948.

Meanwhile, continued growth of pressure groups, which had originally assisted in delivering conservation legislation, was precipitating a relaxation of the link between amenity and ecology. With stronger support, the different factions of the conservation movement could concentrate on their own interests. Indeed, whilst the symbiosis between wildlife organisations and amenity pressure groups had been instrumental in promoting conservation, it was inevitable that the different perspectives of each would ultimately lead to their disjuncture. As Mabey<sup>61</sup> was to comment, '...although the amenity organisations and the scientific conservation bodies often find themselves defending the same sites, their respective approaches remain as far apart as ever.'

The weakening of the amenity/conservation link had commenced as early as the 1940s, when ecologists were gradually assuming leadership of the conservation movement,<sup>62</sup> a development that explains the significant involvement of the BES within post-war planning discussions. Participation of scientists whose main interests were flora and fauna -- in a scientific as opposed to recreational context -- would inevitably lead to a greater acceptance of the significance of

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<sup>59</sup> Written reply concerning the Government's response to the Scott Report recommendations; 30 November 1943 - HC Debates, Vol. 395; Col. 225.

<sup>60</sup> Oral reply of 29 April 1948; HC Debates, Vol. 450; Col. 600.

<sup>61</sup> R. Mabey, *The Common Ground A place for nature in Britain's future?* London: Hutchinson, 1980, p.225.

<sup>62</sup> See P. Lowe, G. Cox, M. MacEwen, T. O'Riordan & M. Winter; *Countryside Conflicts The politics of farming forestry and conservation*, Aldershot: Gower Publishing Co. Ltd., 1986.

wildlife for its own sake at official levels. Indeed, with the independent establishment of the NC and National Parks Commission, scientific conservation became clearly distinguished from the national parks movement, a distinction which represented a tangible divergence of the conservation movement into its two main factions and which, as Dwyer and Hodge<sup>63</sup> suggest, mirrored the original dichotomy in the voluntary groups. The unease flowing from this divergence was acknowledged by the Chairman of the NC in the early 1950s when he reflected that 'the Conservancy lays the greatest stress on the scientific value of nature conservation, in contrast to the 'amenity bodies', though it is difficult, or impossible, to keep the two interests strictly separate.'<sup>64</sup>

Continued dedication to nature conservation by specialist official bodies, and sustained growth of voluntary organisations generally up to the present time have ensured that nature conservation has the necessary prominence to retain its independent representation in the long term. Indeed, the role of voluntary organisations in framing and implementing conservation policy is set to increase further. However, the divisions within the wider movement must necessarily restrict its ability to defend its interests against development threats.

### **Private Property Rights Remain Dominant**

Interest in countryside matters, which had continued to grow from the inter-war years, was further stimulated during the 1960s by several large-scale developments which raised the profile of habitat destruction.<sup>65</sup> The controversy generated ensured that developers henceforth would be obliged to take far greater account of ecological considerations in order to avoid prolonged dispute and adverse publicity.<sup>66</sup> Accordingly, a more positive approach to planning ensued

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<sup>63</sup> J. Dwyer and I. Hodge, *Countryside in Trust - land management by conservation, recreation and amenity organisations*, Chichester: John Wiley & Sons, 1996, p.9.

<sup>64</sup> A.G. Tansley, 'The Conservation of British Vegetation and Species' @ pp.189 & 190, in: *The Changing Flora of Britain*; [pp.188-196] J.E. Lousley (ed.); -- report of the conference held in 1952 by the Botanical Society of the British Isles, Arbroath: T. Buncle & Co. Ltd., 1953.

<sup>65</sup> For example, destruction of the Upper Teesdale National Nature Reserve by the construction of a reservoir in 1966.

<sup>66</sup> J. Sheail, *Seventy-Five Years in Ecology: The British Ecological Society*, Oxford: Blackwell Scientific Publications, 1987, p.231.

during the 1970s, and it became increasingly apparent that proposals with an environmental impact would be accepted only on condition that subsequent restoration of the landscape followed; open-cast mining being an enduring example of this.

However, proliferation of environmental awareness was not accompanied by concord between the conservation factions. This is relevant because suggestions made in response to perceived problems are determined by the viewpoint of the proponent; be it ecological or landscape; scientific or recreational. As Cox et al.<sup>67</sup> say, the often fractured dialogue and tension between contrasting approaches to environmental problems remains a major component of environmental politics. Divergence within the wider conservation movement ensured that powerful economic forces met little opposition on ecological grounds; conditions under which development remained the principal means of habitat destruction.

It is also prudent to examine the ideology behind the planning mechanism itself, as this is the forum in which decisions on development are taken. Environmental organisations and developers merely represent their own interests before the planning authority. Whilst McAuslan<sup>68</sup> regards the preservation of the countryside and agricultural land as the *raison d'être* for planning, such control is itself dominated by considerations of property rights. He lists the ideologies behind planning law as 'public interest', 'private property' and 'public participation'; the first two being dominant. However they are all overridden by a 'community of interest' -- an understanding that the existing balance of property must be maintained against radical attempts to alter it.<sup>69</sup> Thus, if conservation groups are to prevail in a planning dispute, they must overcome the inherent bias towards property rights in land use planning. The ideology of private property also defines the issue of *locus standi*;<sup>70</sup> traditionally it ensured that standing was confined to those with a proprietary interest.<sup>71</sup> Whatever the intention of

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<sup>67</sup> See G. Cox, P. Lowe and M. Winter; *The Voluntary Principle in Conservation the Farming and Wildlife Advisory Group*, Chichester: Packard Publishing Limited, 1990.

<sup>68</sup> P. McAuslan, *The Ideologies of Planning Law*, Oxford: Pergamon Press, 1980; @ p.160.

<sup>69</sup> *Ibid* p.213

<sup>70</sup> See p.54 below.

<sup>71</sup> This position has somewhat altered in recent times, with a wider interpretation of *locus standi*; see the judgment of Otton J. in *R v. HM Inspectorate of Pollution and the*



Parliament when it enacted planning and conservation legislation, subsequent years of practice demonstrated consistency with the ideology of private property. Land owners faced with intrusions on their property could turn to the courts, who would develop principles, precedents and rules of statutory interpretation to protect them from government interference.<sup>72</sup> Maintenance of the private property system represents the outer boundaries of public involvement in this ambit, and ensures that '...coexistence between public interest and private property will always be on private property's terms; there will be no supplanting of the latter by the former.'<sup>73</sup> This is to be expected since, as McAuslan<sup>74</sup> says, the planning system supports the governmental and societal status quo -- the reality is that political power is ultimately stronger than planning theory. The law is operated -- even reformed -- by precisely those people who can be relied upon to maintain the status quo because they and their successors continue to benefit from it. Thus, whatever efforts at reform are made, the outcome is unchanged: a process of legal adaptation and interpretation ensues so that planning controls remain virtually ineffective against the interests of the proponents of the ideologies of public interest and private property, etc. '...in short, the existing governmental and social structure of the country.'<sup>75</sup>

This inherent frustration of conservation interests was exacerbated with the election in 1979 of a government that favoured centralised policy over local planning. For nearly two decades there followed a concerted movement away from planning control, which served to undermine habitat protection law. Just as the emergence of town planning had served to check social abuses flowing from the growth of Victorian cities,<sup>76</sup> so a weakening of planning controls in the 1980s assisted in a return to dramatic economic growth and wealth generation; free from any 'public interest' constraints.

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Minister of Agriculture, Fisheries and Food ex p. Greenpeace Ltd. [1994] JEL Vol.6 No.2.

<sup>72</sup> P. McAuslan, op. cit p.3.

<sup>73</sup> Ibid @ p.145.

<sup>74</sup> Ibid @ p.268.

<sup>75</sup> Ibid @ p.213.

<sup>76</sup> J.T. Hughes, 'Economic Planning' @ p.140, in: *The Spirit and Purpose of Planning* - 2nd edition, ed. M.J. Bruton; London: Hutchinson, 1984.

As the decade commenced, the cornerstones of development policies remained dependent upon concepts relating to the immediate post-war era of population growth and decentralisation; clearly these were less relevant to the 1980s.<sup>77</sup> Like other aspects of the interventionist state, review was long overdue. This came with Mrs Thatcher's process of rolling back the frontiers of the State. A succession of Conservative governments during the 1980s and 1990s delivered rhetoric that spurned the post-war ideals of direct interference in economic activity, and demonstrated a lack of confidence in centralised controls over production and exchange.<sup>78</sup> The resurgence of individualism and laissez-faire economic doctrine was clearly inconsistent with the ideology that had established and maintained the welfare state and town and country planning system. A less restrained attitude would now prevail, in which land use would be determined by the operation of market forces -- not state intervention. As Thornley<sup>79</sup> said, this encouraged the property interests to actively challenge planning. A more lenient approach to development ensued, with increased scope for property interests to over-ride statutory controls. This shift of philosophy is typified by Shankland's statement of 1981 that '...the essence of physical planning...is the management of investment.'<sup>80</sup> A more pragmatic, though no less illustrative, declaration was made by Davies<sup>81</sup> in the same year when he claimed the dominant purpose of planning to be the creation of conditions for and encouragement of development, so that it may '...take place with the least interference and delay.'

Whilst Gilg<sup>82</sup> questions whether the rhetoric of the 1980s was matched by changes in planning law, it seems inevitable in any event that the financial cuts in public spending at this time would have had an adverse effect on the efficacy of local planning control. Furthermore, with the enactment of legislation such as the

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<sup>77</sup> See E.A. Rose, 'Philosophy and Purpose in Planning' @ p.51; Ibid.

<sup>78</sup> J. Dwyer & I. Hodge; op. cit, p.13.

<sup>79</sup> A. Thornley; *Thatcherism and Town Planning*, London: Polytechnic of Central London, School of Environment Planning Unit - Department of Town and Regional Planning; March 1981, @ p.15.

<sup>80</sup> G. Shankland, 'Planners Promoting Investment?' *The Planner*, Vol.67 no. 4, p.90 - July-August 1981, London: Royal Town Planning Institute, 1981; pp.90-92.

<sup>81</sup> H.W.F. Davies, 'Planning Practice' @ p.7; *British Planning Practice and Planning Education in the 1970s and 1980s*; Oxford: Oxford Polytechnic Working Paper No. 70; 1983.

<sup>82</sup> A. W. Gilg, *Countryside Planning Policies for the 1990s*, Wallingford: C.A.B International, 1991; p.58.

Local Government, Planning and Land Act 1980, which radically altered planning concepts,<sup>83</sup> and the use of government circulars to effect a narrowing of planning limits,<sup>84</sup> the framework was in place for the implementation of non-interventionist policies during the 1990s. Indeed, much policy in the planning field is effected with subtlety, central government guidance notes being an obvious example. Thus, a Department of the Environment Circular<sup>85</sup> urged local planning authorities to generally grant consent unless sound reasons for refusal existed. Countryside development was actively encouraged by the government at this time; especially residential building. Only the actions of an alliance of existing residents and rural campaigners<sup>86</sup> prevented development on an enormous scale; although of course expansion into the countryside continues.

Time will tell whether the recent election of a Labour government will ultimately lead to the emergence of a radically different philosophy of conservation vis-à-vis development.

## Conclusion

The modern concepts of national planning and nature conservation emerged simultaneously as legitimate responsibilities of government, and have remained intertwined ever since. The period since the 1940s has witnessed a shift in the importance of voluntary organisations, and in the government's commitment to planning controls. With the rise and fall of the agricultural menace, the nature of the threat facing habitats has also changed. Yet the link between conservation and planning remains fundamental.

Ultimately the planning system, throughout all its stages of evolution, has ensured that the entrenched rights of landowners have been maintained at the expense of the public interest. Nature conservation law is thus undermined by an unjustified degree of faith in the ordinary planning system.<sup>87</sup>

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<sup>83</sup> For example, the introduction of Enterprise Zones; see Schedule 32.

<sup>84</sup> H.W.F. Davies, loc. cit.

<sup>85</sup> Circular 22/80; 'Development Control -- Policy and Practice', London: HMSO, 28 November 1980 @ para. 13.

<sup>86</sup> See A. W. Gilg, op. cit, p.62.

<sup>87</sup> See p.31 below.

History has shown that nature conservation depends on the control of land use by the planning system. It has also been demonstrated that planning is a malleable tool in the hands of policy-makers; it can be made to work towards myriad purposes. Ultimately, political will is vital to the practical effectiveness of habitat protection law; a phenomenon difficult to readily discern at the best of times.

We shall discover in the next chapter that the emerging environmental law of the European Community represents the most effective model of habitat protection. A full understanding of the legal and regulatory processes discussed requires continued awareness that they are a product of over sixty years of policy development.

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## Chapter 3:

### THE LAW

#### Introduction

This paper contributes to the field of environmental law by evaluating the role of legal and regulatory processes in protecting habitats from harmful development. In explaining habitat protection provisions within the planning context, this chapter serves as a basis for that evaluation.

Categories of site designation are discussed,<sup>88</sup> commencing with domestic designations and then considering European and international provisions; relevant case law and provisions of indirect benefit are also referred to. This is followed by an explanation of town and country planning vis-à-vis nature conservation.

Finally, a summary of the means by which planning decisions are challenged and protective laws enforced lays the foundation for the principal critical strand of this work.

#### Nature Conservancy Council

There are three Nature Conservancy Councils (NCC); one each for England, Wales and Scotland pursuant to s.128 Environmental Protection Act 1990 (EPA 1990) and s.1 Natural Heritage (Scotland) Act 1991. S.132(1) EPA 1990 sets out the NCC's general functions, which include: the creation and management of National Nature Reserves (NNRs),<sup>89</sup> notification and protection of Sites of Special Scientific Interest (SSSI)<sup>90</sup> and provision of conservation advice. In the planning ambit, the NCC has a role in general development control and indeed is a statutory consultee of local planning authorities.<sup>91</sup> It therefore provides a link

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<sup>88</sup> Including the role of statutory conservation bodies.

<sup>89</sup> See below; p.32.

<sup>90</sup> See below; p.29.

<sup>91</sup> See below; p.48.

between the habitat significance of a designated site and the planning authority considering development proposals over it.

In England, ecological and landscape issues are divided between English Nature and the Countryside Commission, whilst in Scotland and Wales both aspects are subsumed within the NCC: Scottish Natural Heritage and the Countryside Council for Wales respectively.<sup>92</sup> A degree of co-ordination is brought to this disjunctive arrangement by the Joint Nature Conservation Committee (JNCC), which is itself established by the NCC to undertake special functions pursuant to s.133 EPA 1990. These include responding to conservation issues affecting Great Britain as a whole; in particular matters of national and international importance.

The NCC plays an important role in the administration of habitat protection law, and is pivotal in the protection of sites from development. Its detailed responsibilities within the planning system are discussed below at appropriate junctures.

## **Designating Law**

### 1. Sites of Special Scientific Interest

The basis of habitat designation in the UK is the SSSI,<sup>93</sup> which preserves our best examples of natural heritage; viz. wildlife habitats, geological features and land forms. In respect of the former, the SSSI network represents the minimum area of habitat necessary to maintain the nation's current range and distribution of wildlife.

Notification of sites is governed by s.28 WACA 1981.<sup>94</sup> Where the NCC is satisfied that an area is of special interest by reason of its flora, fauna or geological or physiographical features, it must notify this to the local planning authority, owner or occupier and Secretary of State.<sup>95</sup> A period of at least three

<sup>92</sup> s. 1(3) Natural Heritage (Scotland) Act 1991 & s.130(1) EPA 1990.

<sup>93</sup> All higher designations are also classified as SSSI; see p.64 below.

<sup>94</sup> As amended by s.2 Wildlife and Countryside (Amendment) Act 1985.

<sup>95</sup> s.28(1) WACA 1981; references in this paper to 'Secretary of State' are to the Secretary of State for the Environment, unless indicated otherwise.

months is specified for representations to be made; although notification will lapse under s.28(4A)(ii) where this is not confirmed within nine months. The duty to notify is triggered by s.28, and the NCC has no discretion where a site satisfies that provision's requirements. However, the prospect of a site losing its special qualities in the future is relevant to notification; and indeed it would be wrong to confirm notification if the special interest was doomed.<sup>96</sup> The features justifying protection must be specified in the notification; including operations likely to damage them; s.28(4) WACA 1981. An owner, etc. is thus forbidden to undertake (or allow others to do so) such activities for the duration of the notification; s.28(5).

SSSI designation allows the NCC to protect the ecological interest of a site without necessarily assuming direct control of it; a means of facilitating conservation management on a national scale. This is backed by the criminal law; undertaking notified activities incurring liability to a fine upon summary conviction not exceeding level four under s.28(7) WACA 1981. The NCC<sup>97</sup> in this instance will initiate prosecutions under s.28.

However, the prohibition of notified operations is not absolute. Even damaging activities are permissible in the following circumstances per s.28(5)/(6) WACA 1981: the owner, etc. gives notice to the NCC and; that body consents in writing, or the work is in accordance with a management agreement,<sup>98</sup> or -- in the absence of NCC consent -- four months elapse from the date of notice. We may therefore regard SSSI designation as a means of postponing harmful activity for four months. However, this position can be altered with the agreement of the NCC and owner etc.; whereby they agree that a certain operation will not be affected by the time limit, thus affording more time to the NCC to engineer a solution or find an alternative site before the work proceeds; s.28(6A) WACA 1981.<sup>99</sup>

<sup>96</sup> See *R v NCC, ex p. London Brick Property Ltd.* [1996] J.P.L. 227.

<sup>97</sup> And no-one else without the Director of Public Prosecution's consent; s.28(10) WACA 1981.

<sup>98</sup> i.e., an agreement between the NCC and owners, lessees and occupiers whereby land use is regulated in the interests of conservation; s.15 Countryside Act 1968.

<sup>99</sup> This itself is restricted by s.28(6B) WACA 1981, which allows an owner etc. to terminate such agreement by writing and commence the operation after one month.

The protection of SSSI against harmful activities is punctured by s.28(8) WACA 1981; in particular (8)(a) provides that any operation authorised by planning permission under the Town and Country Planning Act 1990 (TCPA 1990) qualifies as a 'reasonable excuse'. This fundamental exception provides a means of circumventing habitat protection law, so that even designated sites are potentially at risk from development; it is this loophole that provides the central focus of this research. Notwithstanding NCC recognition of the ecological interest present, planning permission sweeps away all constraints upon a SSSI so that the interest may be destroyed with impunity.

A minority of SSSI qualify for the higher degree of protection afforded by Nature Conservation Orders (NCOs), under s.29 WACA 1981. Such habitats must be of national importance; and the Orders must be necessary to secure the survival of an animal or plant within Great Britain, to comply with an international obligation or to conserve the special features justifying designation; s.29(1). The Order is a matter for the Secretary of State's discretion;<sup>100</sup> although he will consult the NCC in advance. Once operative, all persons are prohibited, subject to certain exceptions, from carrying out the damaging operations<sup>101</sup> specified in the Order under s.29(3)(b); such operations being those likely to destroy the features prompting the Order; s.29(3)(a). However, as in the case of basic SSSI protection, prohibition of damaging operations is not absolute. Almost identical exceptions to those contained in s.28(5)/(6) WACA 1981 apply to NCOs by virtue of s.29(4)/(5); except that in the absence of NCC consent the activities may proceed after the expiry of three months, (as opposed to four months for basic SSSI protection). However, the advantage of obtaining a NCO is that it facilitates an extension of this time limit to twelve months under s.29(6) WACA 1981. Furthermore, this automatically occurs where the NCC, during the three month period, offers to buy or lease the land, or enters into a management agreement with the person giving notice. A NCO thus provides more time in which to

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<sup>100</sup> His opinion on whether the order is justified will not be interfered with under judicial review provided it is a reasonable one supported by evidence; see *North Uist Fisheries Ltd. v Secretary of State for Scotland* [1992] JEL 241.

<sup>101</sup> As for basic SSSI, breach of the prohibition is punishable by a fine; s.29(8) WACA 1981.



arrange a management agreement or land purchase; justified by the greater conservation need of those areas qualifying for it.

Once either time limit has expired, further harmful operations can no longer be prevented. However, NCOs confer a power to compulsorily acquire the land; applicable upon Secretary of State consent during both the initial three month and extended twelve month periods under s.29(7) WACA 1981. Where this exceptional remedy is not pursued, the habitat remains at risk from potential development as 'reasonable excuses' under s.29(9) include: (a) operations authorised by planning permission.

## 2. National Nature Reserves

NNRs represent official habitat protection by direct control; such sites being held and managed by the NCC itself or managed as reserves with its agreement.<sup>102</sup> This degree of control over the small network of mainly NCC owned sites is justified by the national importance of such habitats -- a requirement of s.35 WACA 1981.

Designation is very simple; provided the NCC is satisfied a site justifies NNR status, a simple declaration<sup>103</sup> to this effect is final; s.19(2) NPACA 1949. However, the NCC must also be assured that the site is being managed as a reserve; either under its direct ownership or via that of an approved body; s.35(1) WACA 1981. Where the NCC is unable to ensure satisfactory management of a site via a nature reserve agreement, compulsory purchase is available under s.17 NPACA 1949.

The crux of the protection flowing from NNR designation is direct control. Indeed, the NCC may pass bylaws to regulate activity upon the reserves under s.20(1) NPACA 1949; although these cannot interfere with personal rights of an owner, etc. or public rights of way.<sup>104</sup> The chances of such a habitat succumbing

<sup>102</sup> In which case a 'Nature Reserve Agreement' is concluded between the NCC and owners etc.; s.16(1) NPACA 1949.

<sup>103</sup> i.e. publication of a notice.

<sup>104</sup> *Evans v Godber* [1974] 1 WLR 1317.

to development are therefore much reduced compared to SSSI; where designation does not normally affect ownership or impose such close relationships.<sup>105</sup>

### 3. The Wild Birds Directive

The domestic law described above has been significantly strengthened by European provisions, through which entirely separate, though overlapping, designations have been created. Under s.2(1) European Communities Act 1972 EU legislation is recognised as law in the UK. However, specific regulations also serve to implement the European initiatives across the domestic legal framework.<sup>106</sup>

Two Directives are of particular relevance to this research: the 'Birds' and 'Habitats' Directives. The former: Council Directive on the Conservation of Wild Birds,<sup>107</sup> promotes the conservation of all wild birds throughout EC territory,<sup>108</sup> covering both species management and habitat protection. Its general policy, as stated in Art.2, is the maintenance of bird populations at levels consistent with ecological requirements. However, notwithstanding rulings in *Commission v Germany*<sup>109</sup> and *Commission v Spain*<sup>110</sup> -- which restricted relevant criteria almost exclusively to ecological considerations -- economic factors may also have a role to play.<sup>111</sup>

The Birds Directive requires Member States to take positive measures to ensure a sufficient diversity of habitats is maintained, including the creation and management of protected areas for bird conservation; Art.3. Action must be taken to ensure that such sites do not deteriorate; a requirement that applies both to

<sup>105</sup> In addition to the above designations, there are two other habitat protection measures which merit an allusion. LNRs are the local equivalent of NNRs; designation being on grounds of local importance with control exercised by the local authority; s.21 NPACA 1949. Marine Nature Reserves (MNRs) rectify the limitation upon SSSI designation below the low water mark; s.36 WACA 1981 providing for the establishment of these coastal equivalents to NNRs over land submerged by sea and tidal waters.

<sup>106</sup> See the Conservation (Natural Habitats & c.) Regulations 1994 SI 1994 No.2716 (C(NHR) 1994); below pp.35-39.

<sup>107</sup> 79/409/EEC; [1979] O.J. L103/1.

<sup>108</sup> Except Greenland, where the Directive does not apply.

<sup>109</sup> C-57/89 [1991] ECR 883; 'Leybucht Dykes'.

<sup>110</sup> C-355/90 [1993] Water Law 209; 'Santona Marshes'.

<sup>111</sup> These are explicitly mentioned in Art.2; but see also Art.6(4) Habitats Directive; below p.38.

protected areas and other bird habitats under Art.4. The Directive acknowledges the increased vulnerability of some species; Annex I listing those whose rarity justifies special habitat protection.<sup>112</sup> Additionally, regular migrants qualify for such treatment under Art.4(2).<sup>113</sup>

Each member State is obliged to select its most suitable territories for classification as 'Special Protection Areas' (SPAs) according to the above criteria; Art.4(1).<sup>114</sup> Details of such sites are then forwarded to the European Commission, who will monitor their impact on overall conservation under Art.4(3). Indeed, Member States are obliged to report triennially to the Commission on their implementation of the Birds Directive. Other than the requirement to designate SPAs, the Directive is not specific as to the means by which its objectives should be accomplished. It was implemented in the UK via the SSSI requirements of the WACA 1981; although the C(NH)R 1994 also now apply, and these govern the protection of SPAs from development.<sup>115</sup>

#### 4. The Habitats Directive

The 'Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora'<sup>116</sup> is concerned with the habitats of wildlife per se. It seeks to achieve a coherent ecological framework of important sites across Europe; known as 'Natura 2000'.<sup>117</sup>

Under Art.4 Member States assess sites for submission to the European Commission, using such criteria as the proportion of the country's entire habitat type represented and size and density of wildlife populations. The Commission will then assess the Community importance of sites submitted; which turns upon

<sup>112</sup> Relevant factors include: proximity to extinction, vulnerability to habitat changes and restricted local distribution; Art.4(1).

<sup>113</sup> Account is taken here of breeding, wintering and moulting areas and resting places; particular attention is paid to wetlands -- see The Ramsar Convention, below @ p.39.

<sup>114</sup> Classification must be in response only to ornithological criteria determined by the Directive; see 'Santona Marshes' [1993] Water Law 209, where the court condemned Spain for failing to classify the Marismas de Santona. A site important for just one endangered species will satisfy the criteria -- almost all of the evidence submitted by the European Commission in 'Santona' concerned the Spoonbill.

<sup>115</sup> See Reg.10(1)(d); and for discussion of the Regulations in this context see below p.37.

<sup>116</sup> 92/43/EEC(c); [1992] O. J. L206/7.

<sup>117</sup> Art.3.

such things as geographical position relative to migratory routes, total area and global ecological value.<sup>118</sup> Sites containing a 'priority natural habitat type'<sup>119</sup> are automatically granted Community importance. Sites accepted by the Commission as being of Community importance are protected as 'Special Areas of Conservation' (SACs).

The Habitats Directive was brought into direct effect within the UK via the C(NH)R 1994; Reg.7(1) obliging the Secretary of State to furnish a list of suitable sites to the European Commission. Where the latter adopts a habitat as being of Community importance, the Secretary of State must designate this as a SAC as soon as possible, and in any event within six years; Reg.8(1).

Art.6 Habitats Directive requires positive conservation measures to be taken in respect of SACs; an important departure from the merely passive protection adopted in respect of domestically designated sites. Both SACs under the Habitats Directive and SPAs under the Birds Directive are regarded as 'European sites' by the C(NH)R 1994.<sup>120</sup> Reg.11(1) obliges the Secretary of State to compile and maintain a register of such habitats within the UK; this includes sites of Community importance both before and after classification. The inclusion or amendment of an entry within this register must be notified to the NCC under Reg.12, who will in turn inform the owner, etc. and local planning authority; Reg.13(1). However, in any event all register entries are local land charges under Reg.14, so planning authorities are deemed to be aware of local sites of Community importance.

Formalities applying to SACs under the C(NH)R 1994 are almost identical to those which govern basic SSSI. Thus, notification to a landowner under Reg.18 that his land qualifies as a SAC will be in the format required by s.28 WACA 1981 in respect of SSSI. The prohibition upon damaging operations is contained within Reg.19; and the 'exceptions' and 'reasonable excuses' which apply to SSSI are repeated in Regs.19(2) and 19(4) respectively, including the planning permission loophole. Enforcement of the provisions relating to SACs is also in identical form to that in respect of SSSI.

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<sup>118</sup> Annex III.

<sup>119</sup> See below; p.38.

<sup>120</sup> See Reg.10.

However, extra protection is extended to all European sites by Reg.22 C(NH)R 1994, which empowers the Secretary of State to make a Special Nature Conservation Order (SNC). Under Reg.22(1), this must specify the operations that are likely, in his opinion, to damage the features justifying European designation. Once a SNC is operative, the operations specified are prohibited under criminal law; Reg.23(1). This provision is therefore a means by which harmful activities may be explicitly forbidden by Ministerial Order, delivering the flexibility required to target anticipated threats. As in the case of NCOs, the potential impact of such Orders is limited by several exceptions. Provided an owner, etc. gives written notification of his proposed work to the NCC, he may proceed where the NCC consents in writing or where the work is in accordance with a concluded management agreement. However, unlike the situation pertaining to domestically designated sites, there is no automatic facility for proceeding with the work upon the expiry of three or four months. Rather there is a limited, although potentially indefinite, bar upon activity the NCC considers harmful to land over which a SNC applies.

The limitation concerns development threats, from which SNCs alone provide no better protection than NCOs. Reg.23(4) C(NH)R 1994 provides that harmful work carried out under planning permission is excused. Therefore, the only absolute means of protecting a European site from the type of development activity targeted by SNCs is its purchase. This can be undertaken compulsorily under Reg.32; available in respect of those habitats where the NCC is unable to conclude a management agreement on reasonable terms, and in cases where such an arrangement has been in force but its breach impairs future satisfactory management.

Whilst European site status does not close the planning permission loophole, it does intervene in the planning system<sup>121</sup> to mitigate its potential impact. Reg.48 C(NH)R 1994, which satisfies Art.6(3) Habitats Directive, requires the local planning authority to take account of environmental factors pertinent to planning applications. In particular, projects not part of ordinary management that are

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<sup>121</sup> For a discussion of the general planning system, including its treatment of domestically designated sites, see pp.42-46 below.

likely to have a significant effect upon European sites must be subject to prior assessment; to ascertain their implications in view of the site's conservation status; Reg.48(1). In assessing this, a planning authority must consult the NCC and take account of public opinion under Reg.48(3)/(4). Prospective developers must provide authorities with whatever information they require for the assessment; Reg.48(2), and ultimately a project may proceed only when the authority is satisfied that it will not compromise the site's integrity; Reg.48(5). This will depend upon the manner in which the work will be undertaken and any conditions restricting the proposed consent; Reg.48(6).

Consent granted during less environmentally aware periods can be particularly problematic;<sup>122</sup> for this reason the C(NH)R 1994 facilitate its revision. The assessment requirements contained in Reg.48 are given retrospective effect by Regs.50 and 51; which require a prompt review of consent granted prior to a site gaining European status or prior to the commencement of the Regulations. Such review is undertaken with a view to the affirmation, modification or revocation of consent<sup>123</sup> under Reg.50(1); and involves full assessment of the implications in view of the site's conservation objectives as if the project were subject to a fresh application under the Regulations; Reg.50(2). The emphasis here is upon avoiding revocation, for where mitigation of any adverse effects is practicable the consent should be affirmed; Reg.51(3). Indeed, the planning authority is under a duty to investigate whether adverse effects can be overcome by planning obligations. However, where these persist, consent must be revoked or modified under s.97 TCPA 1990<sup>124</sup> or discontinued via s.102; compensation will be appropriate in such an event. In any case, review cannot affect development that has, by that time, been completed or is no longer an issue due to the expiry of time limits; Reg.55.

The safeguards represented by assessment and review are limited by Reg.49 C(NH)R 1994. This permits harmful development of a European site where there are no alternatives to the project and it is essential for 'imperative reasons of overriding public interest'; Reg.49(1). Such 'imperative reasons' include public

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<sup>122</sup> See pp.71-72 below.

<sup>123</sup> Review proceeds under normal planning procedures.

<sup>124</sup> See below; p.46.

health and defence issues, and indeed social and economic considerations -- which are explicit within Reg.49(1). Where a planning authority proposes to authorise a project with adverse impact upon a European site, it must consult the Secretary of State and then wait for twenty-one days before doing so; Reg.49(5). The Secretary of State may direct the authority not to authorise the development; for the duration of a specified period or indefinitely.

The exceptional development of European sites for social and economic reasons has generated a substantial amount of case law, and indeed forms the backdrop to the main case studies of this research.<sup>125</sup> *Commission v Germany*<sup>126</sup> concerned the reinforcement of Leybucht dykes, leading to a reduction of SPA boundaries. The work was necessary for public safety, a reason accepted as being sufficiently serious by the ECJ. The court went on to hold that SPA reduction could only be justified on very limited grounds: those corresponding to a general interest that is superior to the general interest represented by the Directive's ecological aim. Development could not be permitted for economic or recreational reasons. This approach was underlined in *Commission v Spain*,<sup>127</sup> which applied the Leybucht principle to habitat degradation by pollution. However, these rulings were rendered impotent by enactment of the Habitats Directive; Art.6(4)<sup>128</sup> of which now governs European site development and indeed permits it exceptionally on economic grounds. However, notwithstanding the facility in Reg.49 to develop European sites, the general prohibition of projects compromising their integrity serves to afford them better protection than that extending to SSSI.

Furthermore, the situation under Reg.49 C(NH)R 1994 is altered where the site in question contains a 'priority natural habitat' or 'priority species'.<sup>129</sup> In this event, the imperative reasons justifying development may relate only to human health, public safety, important environmental issues or other reasons the European Commission considers imperative. Thus, the Leybucht position

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<sup>125</sup> See pp.90-97 & 97-109.

<sup>126</sup> [1991] ECR 883.

<sup>127</sup> [1993] Water Law 209.

<sup>128</sup> Reflected in Reg.49 C(NH)R 1994.

<sup>129</sup> Defined by Art.1 Habitats Directive.

continues to apply to such exceptional habitats, which are therefore insulated from most sources of development pressure.

Another European protective initiative is the compensation requirements attendant upon European site development under Reg.53 C(NH)R 1994; a benefit denied to domestically designated habitats.<sup>130</sup> For all sites developed under Reg.49 C(NH)R 1994, the Secretary of State must take appropriate compensatory measures by providing an alternative site for European designation. This ensures that the overall integrity of the Natura 2000 network is maintained.

### 5. The Ramsar Convention

Legal protection of wildlife habitats has been further augmented by several Conventions; the means by which international intent and policy are formalised. The most important for our terms of reference is the 'Convention on Wetlands of International Importance Especially as Waterfowl Habitat',<sup>131</sup> adopted at Ramsar in 1971 to protect the increasingly vulnerable habitats of wetland birds.

Under the Ramsar Convention each Signatory promises to protect important wetland habitats, known as 'Ramsar sites', within its territory. The meaning ascribed to the term 'wetland', as defined by Art.1, is in keeping with the broad sense of the word and thus will include what is ordinarily considered to be wetland, such as marsh and fen; both natural and artificial. The emphasis within the Convention is upon protecting those sites that support waterfowl.<sup>132</sup> As in the case of the above provisions, protection is effected by site designation; Art.2. However, the details of designated sites are maintained by the International Union for Conservation of Nature and Natural Resources, which administers the Convention under Art.8. Habitats selected are of international importance; such status being determined by scientific criteria under Art.2(2). Each Signatory must list at least one site when signing or ratifying the Convention.

Ramsar acknowledges the crucial role played by planning in habitat protection; Art.3(1) requiring parties to formulate planning policies so as to

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<sup>130</sup> See p.44 below.

<sup>131</sup> Cmnd.6465, HMSO; 1976; as amended by Protocol of 3.12.82.

<sup>132</sup> That is, birds ecologically dependent on wetlands; Art.1.



promote the conservation of Ramsar sites, and encourage the wise use of wetlands generally. Indeed, Art.4(1) obliges Parties to establish reserves on wetlands, whether listed under Ramsar or not, in the interest of waterfowl conservation. The UK government is therefore obliged, as a Signatory, to positively avoid land development that has harmful impact upon not only listed Ramsar sites but all wildfowl habitats. This provision is thus material to planning policy generally, in addition to protecting specific habitats.

However, the Ramsar Convention also acknowledges the unfeasibility of preserving habitats indefinitely. Art.4(2) permits the deletion and restriction of Ramsar boundaries; although this must be justified by urgent national interests. A Signatory resorting to Art.4(2) is obliged, as far as possible, to compensate for the loss; in particular by creating an alternative reserve for waterfowl so an adequate portion of original habitat type survives. Compensatory land may, or may not, be in the same area as the habitat lost. In this respect, Ramsar enhances SSSI protection in a similar manner to the European provisions discussed above.

The means by which the Ramsar Convention is accommodated by the existing legal and planning framework affects the promotion of conservation in the context of Art.3(1). The UK has chosen to designate as Ramsar sites only those habitats that already have national legal protection; thus designation follows the SSSI formula, with all terrestrial sites concurrently listed as SSSI. The Convention therefore contributes to the overlapping of site designations; not least because many Ramsar sites additionally qualify as SPAs on ornithological grounds. Whilst they do not constitute European sites per se under the C(NH)R 1994, the government currently<sup>133</sup> applies the same considerations in respect of potential and classified European sites to listed Ramsar sites. There is additional support for the view that Ramsar sites enjoy much the same level of theoretical protection as European sites in the Recommendations of the Cagliari Conference.<sup>134</sup> Thus, under Recommendation 1.5 the wise use of wetlands requires maintenance of ecological interest as a basis for conservation and sustainable development.

<sup>133</sup> See JPL April 1997; pp.373-379.

<sup>134</sup> A meeting held in November 1980 of the Parties to the Ramsar Convention, at which several Recommendations were made to improve its effectiveness -- these do not bind the Parties in the same way as Articles do, but should nevertheless be complied with.

Furthermore, assessment should be undertaken prior to planning decisions, and ecologists ought to be involved in the planning process -- as per Recommendation 1.6.<sup>135</sup>

The above requirements are clearly conducive to full consideration of Ramsar sites' ecological significance by planning authorities. However, in terms of ultimate protection from development, Ramsar sites rely entirely upon the SSSI system.<sup>136</sup>

## 6 Indirectly beneficial provisions

The following legal measures, whilst not principally concerned with habitat protection, serve to indirectly assist that cause. They reflect the link between conservation and amenity; a connection that has existed since the introduction of protective legislation in the 1940s.<sup>137</sup> Clearly, provisions aimed at protecting the countryside per se, and indeed encouraging a sensible balance of land uses generally, will benefit habitats. For example, s.11 Countryside Act 1968 specifically obliges all Ministers, government departments and public bodies to have regard to conserving the natural beauty and amenity of the countryside when carrying out their duties over land; local planning authorities fall under this provision.

The tighter planning controls in respect of national parks, introduced for purposes of amenity by the NPACA 1949, are clearly not inconsistent with nature conservation; the maintenance of countryside for whatever reasons assisting in habitat preservation.<sup>138</sup> Furthermore, their original purposes have subsequently been extended to embrace conservation and enhancement of natural beauty, *wildlife* and cultural heritage; and the promotion of opportunities for public

<sup>135</sup> S. Lyster, *International Wildlife Law*, Cambridge: Grotius Publications Ltd, 1985; pp.196-198.

<sup>136</sup> Also applicable to habitat protection but not relevant to the cases researched, are: the 'Convention on the Conservation of European Wildlife and Natural Habitats' (Cmnd 8738, 1982; the 'Berne Convention') and the 'Convention on the Conservation of Migratory Species of Wild Animals' (Cmnd. 1332, 1990; the 'Bonn Convention').

<sup>137</sup> See pp.16-22 above.

<sup>138</sup> This is also a benefit of Areas of Outstanding Natural Beauty (AONB); see s.87 NPACA 1949.

enjoyment and understanding of such special qualities.<sup>139</sup> National park planning authorities must have regard to these purposes; and where there is conflict between conservation and amenity, greater weight must be attached to the former under the 'Sandford principle' enshrined within s.11A(2) NPACA 1949.

Similarly, designation of Environmentally Sensitive Areas under s.18 Agriculture Act 1986 assists habitat protection. Indeed these may be designated upon consultation with the NCC specifically to conserve wildlife and landscape;<sup>140</sup> although they are primarily aimed at checking the excesses of agriculture. Nevertheless, it is a designation to which the attention of planning authorities will inevitably be drawn where development is proposed.

Habitat protection is also a feature of the 'Convention on Biological Diversity',<sup>141</sup> which promotes the conservation of biological diversity and sustainable use of its components. In addition to developing strategies to facilitate this under Art.6, Parties are obliged to establish a system of areas that are either protected per se or benefit from conservation measures; Art.8. Indeed, para.(d) explicitly encompasses habitat protection in this context. At the very least, the Convention represents a fetter upon government planning policies in the interests of ecology. Furthermore, the planning process is enhanced by the requirement in Art.14 to establish procedures assessing the environmental impacts of projects likely to have significant adverse effects on biological diversity. This supports the earlier formal requirements of Environmental Impact Assessment (EIA),<sup>142</sup> which represent a valuable tool of habitat protection in the planning ambit.

## **The Planning Process**

### **1. General Planning Control**

As it is the planning system through which conflicts between conservation and development are resolved, and by which the prohibition upon damaging

<sup>139</sup> s.5(1) NPACA 1949; as amended by s.61 Environment Act 1995.

<sup>140</sup> See s.18(1)(b) Agriculture Act 1986.

<sup>141</sup> Cmnd. 2127, 1992 (HMSO 1993).

<sup>142</sup> See below; pp.50-53.

protected habitats may be circumvented, an explanation of its operation is an essential objective of this chapter.

Both designated and non-designated habitats fall to be considered by the ordinary town and country planning system when targeted by development; this is currently based on the TCPA 1990. The pivotal feature of planning control is the pre-condition that any proposal constituting development requires planning permission from the relevant planning authority. 'Development' is defined in s.55(1) TCPA 1990 as 'the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land'. Thus, any activity that falls *prima facie* within this broad definition requires advance consent; notwithstanding an applicant has absolute ownership of the land in question. The term 'material change in use' concerns the character of the proposed land use. Many considerations apply here, and it is a question of fact and degree in each case whether an operation ultimately constitutes development and thus requires a planning permission application.<sup>143</sup> Certain activities, such as agriculture and forestry,<sup>144</sup> are excluded from the definition of development by s.55(2) and therefore fall outside the planning permission requirements.

Where an application is required, this is made to the relevant local planning authority and must include details of the proposed development and land to which it refers. In considering the application, the authority is guided in the factors to be taken into account. In particular, it must have regard to the provisions of the development plan, in so far as these are material to the application; s.70(2) TCPA 1990. Development plans contain the development policies<sup>145</sup> of the planning authority in question; and are a requirement of s.12(1) TCPA 1990. They represent official policy on development and thus reflect current national and regional standpoints, taking into account guidance received from the Secretary of State; s.12(6). However, the authority is entitled, under Art.17 Town and Country

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<sup>143</sup> Such application is not required where consent is deemed under a general development order (GDO); see below p.46-47.

<sup>144</sup> Notwithstanding their potential for habitat damage.

<sup>145</sup> See ss.10-28 TCPA 1990.

Planning (General Development Procedure) Order 1995, (TCP(GDP)O 1995)<sup>146</sup> to grant consent that conflicts with the development plan; in this event the Secretary of State may impose conditions. Clearly, each application will raise its own issues and it is prudent that the planning authority, in the exercise of its discretion, has regard to all material considerations; a requirement of s.70(2) TCPA 1990.

SSSI status may<sup>147</sup> constitute one such factor. Other influences within the decision-making process are representations received in response to notice of the application being displayed or served on an interested party; the planning authority must take these into account under Art.19 TCP(GDP)O 1995.

Where SSSI status is a material consideration, the fate of the habitat will effectively depend upon the net result of a balance between the conservation interest on one hand and the benefits of development on the other. Basic SSSI designation is a means of ensuring that the special interest of a site is brought to the attention of the planning authority. It is important to note that, notwithstanding the SSSI network is crucial to maintaining the nation's current range and distribution of wildlife, there is no legal requirement to consider development of one site as being potentially detrimental to the integrity of the overall network. Each site is considered independently on its merits, and where development is authorised there is no requirement to designate a replacement SSSI.

Whilst all SSSI are potentially at risk from authorised development, the planning authority will have regard to any other designations concurrently benefiting the site in question. NNRs are nationally important, a factor justifying Ministerial intervention under s.77 TCPA 1990; although the fact that many are owned by the NCC will better insulate such sites from development pressure.<sup>148</sup> Ultimately, the relative status of the habitat in question is a material factor to be

<sup>146</sup> 1995, No. 419; this is actually a GDO, which contains procedures in respect of planning applications.

<sup>147</sup> See p.76 below.

<sup>148</sup> Ownership of habitats, however, is no guarantee of their preservation, as all land is potentially subject to compulsory purchase orders; see the Acquisition of Land Act 1981; s.2.

weighed against other pertinent issues; which may or may not prove more influential than ecology.

Where planning permission is granted, it may be unconditional or subject to specified conditions under s.72 TCPA 1990. Any conditions attached must be reasonably related to the development in question; and indeed under s.91 all permission is deemed to include a condition that development must commence within five years from the date of consent; or some other period stipulated by the authority.<sup>149</sup> Planning permission enures for the benefit of the land and thus applies to all subsequent owners under s.75. It cannot be extinguished by mere conduct, such as a commercial decision to cease the use, unless the terms of the permission explicitly provide for it.<sup>150</sup> This may prove especially problematic in cases where consent has been granted in less environmentally aware periods, and where land has acquired habitat significance subsequent to the planning permission.<sup>151</sup>

Many development proposals raise issues of national importance; not least in the field of nature conservation. It is therefore appropriate that the Secretary of State is empowered to intervene in the local planning process. S.77 TCPA 1990 entitles him to 'call-in' an application for his own determination -- his decision being final; s.77(7).<sup>152</sup> In this event, the applicant and local planning authority are entitled to appear before an inspector appointed by the Secretary of State, though the latter is not bound by the inspector's conclusions and is indeed required to form an independent view.<sup>153</sup> The involvement of the Secretary of State in a planning matter is testimony to the importance of issues raised by that case. For this reason, when utilising powers under ss.77-78,<sup>154</sup> he may refer questions to a Planning Inquiry Commission under s.101 TCPA 1990; these must be of national or regional importance, or be considerations of a scientific nature justifying special inquiry; s.101(3).

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<sup>149</sup> s.91 does not apply to permission granted by Development Order; see below, p.46.

<sup>150</sup> *Pioneer Aggregates (UK) Ltd. v Secretary of State for the Environment* [1985] AC 132.

<sup>151</sup> For an example of this see the case of *Hartshead and Ivonbrook quarries* @ pp.71-72 below.

<sup>152</sup> But see the challenge procedure below; pp.53-57.

<sup>153</sup> *Nelsovil Ltd. v Minister of Housing and Local Government* [1962] 1 All ER 423.

<sup>154</sup> s.78 provides an applicant whose application has been refused, or granted subject to conditions, with a right of appeal to the Secretary of State.

Although planning permission *prima facie* enures *ad perpetuum*, it is clearly prudent to provide for subsequent variation in order to meet changed circumstances. This is possible under s.97 TCPA 1990, which empowers the local planning authority to modify and indeed revoke consent. The authority must have regard to the development plan and other material considerations in doing so, and the Secretary of State's approval is also required; s.98(1).<sup>155</sup> Prior to the latter's confirmation there is a right to a hearing before an inspector under s.98(4). The practical impact of the power to revisit consent is significantly limited by two provisos: it cannot affect activities which have already proceeded under the consent, s.97(4) TCPA 1990; and the planning authority will be liable under s.107 to compensate an applicant who has suffered financial loss as a result of the modification or revocation. The financial implications flowing from s.107 represent a very substantial disincentive to interfere, with the result that s.97 is used most sparingly in practice. Indeed, this provision effectively renders the vast majority of planning permissions final and permanent.

## 2. General Development Order

Not all development requires planning permission; an important exception to the general principle enunciated above<sup>156</sup> is the phenomenon of the development order. Under s.59(1) TCPA 1990, the Secretary of State is empowered to grant planning permission by development order; which may be general to all land or specific to a parcel referred to in the order. As in the case of consent granted to an applicant, it may be unconditional or subject to specified conditions; s.60(1).

Art.3 Town and Country Planning (General Permitted Development) Order 1995 (TCP(GPD)O 1995)<sup>157</sup> thus grants planning permission to an entire range of development classes; and as such this GDO facilitates circumvention of the usual planning process. Indeed, it was in order to mitigate the potentially draconian

<sup>155</sup> Indeed the Secretary of State is himself empowered to intervene under s.97, via s.100 TCPA 1990; before doing so he must consult the local planning authority; s.100(3).

<sup>156</sup> p.43.

<sup>157</sup> 1995, No. 418; as amended by Town and Country Planning (General Permitted Development) (Amendment) Order 1997, SI 1997 No. 366.

controls implicit in the introduction of wholesale planning in the post-war years<sup>158</sup> that GDOs were made.<sup>159</sup> They are also capable of promoting certain activities, as the agricultural exemption demonstrated, and thus represent an important tool in the planning process. The example of agriculture clearly demonstrates that GDO exemption may have an extremely dramatic effect on habitat.

Schedule 2 TCP(GPD)O 1995 grants deemed consent to a list of development classes; it also itemises exceptions for which ordinary planning applications are required. Thus, Class A of Part 4 grants consent to temporary buildings and uses, with the exception of mining activities; there are also conditions, (e.g. reinstatement of land) attached to the consent. Agricultural consent is granted by Part 6; and a no less ecologically significant exemption -- activities necessary for forestry -- is found in Part 7. Other relevant classes include: Part 13 Class A -- works to maintain or improve a highway on adjoining land, Part 15 Class A -- development to improve land drainage works and Part 17 -- development by Statutory Undertakers. The GDO also makes provision for designated habitats that might be affected by deemed consent. For example, Part 22 Class A consents to work pertaining to mineral exploration, but this is not permitted where the operation would be within, inter alia, a SSSI; A.1.(c).

Although potentially of wide-ranging effect in the consent it may deem, the GDO is limited in its operation. Consent granted in respect of Schedule 2 Classes cannot permit that which has been restricted by a condition contained in other planning permission; Art.3(4) TCP(GPD)O 1995. Furthermore, the requirement of full planning permission may be imposed under Art.4, where the planning authority<sup>160</sup> or Secretary of State so direct; this will render deemed consent under Art.3 inapplicable to the development specified. Thus, notwithstanding the significant influence GDO exemption may have upon habitats, full consideration of planning issues remains an option available to decision-makers.

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<sup>158</sup> See p.14 above.

<sup>159</sup> The first GDO was made as early as 1948; SI 1948 No. 958.

<sup>160</sup> A planning authority's direction must be approved by the Secretary of State; Art.5.



### 3. Planning Policy Guidance

Central government policy on planning is furnished to the local authorities by means of planning policy guidance notes (PPG). Although guidance across several areas has an impact upon nature conservation,<sup>161</sup> 'PPG9 Nature Conservation'<sup>162</sup> is specifically concerned with this field, and thus represents current policy on development where habitat is an issue.

PPG9 seeks to ensure that an appropriate balance is struck between conservation and development -- two potentially conflicting courses that, with careful planning, are considered broadly compatible (para.3). Where conflict is unavoidable, para.2 seeks to minimise the adverse effects on wildlife. The guidance accepts that the key to wildlife conservation is the protection of habitat on which it depends (para.4). Nature conservation should be taken into account in all planning activities affecting rural and coastal land, and in urban areas hosting wildlife of local importance; para.19. Expert advice is therefore essential; a factor acknowledged by para.20, which directs planning authorities to the advice provided by both the NCC and voluntary organisations such as the RSPB and County Wildlife Trusts. Consultation is crucial to the successful balancing of land use conflicts, and indeed the NCC plays a consultative role where nature conservation is an issue.<sup>163</sup> A planning application in respect of a SSSI must not be determined within fourteen days of initiating consultation. Indeed, consultation is appropriate wherever a development proposal affects a NCC consultation area<sup>164</sup> surrounding a SSSI -- whether the habitat itself is directly affected or not. As SSSI are the basis for site designation in the UK, the consultation requirements attaching to them thus apply across all higher designations also; essential to an environmentally responsible planning process.

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<sup>161</sup> E.g. PPG12, February 1992; (para. 6.24-5 re. environmental appraisal of proposals), London: HMSO.

<sup>162</sup> London: HMSO, October 1994.

<sup>163</sup> Before granting planning permission over a SSSI, the local planning authority must consult with the NCC unless the latter dispenses with that requirement; TCP(GDP)O 1995 Art.10 Table para.(u). The authority will thereafter inform the NCC of the decision made (para.33 PPG9).

<sup>164</sup> This may extend up to 2km from SSSI boundaries; para.31 PPG9.

Para.12 PPG9 expresses the government's commitment to meeting the obligations flowing from designation of sites, ensuring their protection from damage and destruction. Additionally, the guidance acknowledges that areas of conservation interest exist outwith statutory designated sites; para.14. Indeed, whether designated or not, features of critical importance for wildlife in terms of migration and dispersal, etc., such as hedgerows and rivers (often referred to as 'wildlife corridors'), will benefit from careful management and ought to be accommodated by planning policy; paras. 16 & 23.<sup>165</sup>

PPG9 aims to ensure that habitats receive appropriate recognition within the planning process, in particular that the account taken of a site's ecological value is proportionate to its relative importance -- planning authorities must therefore have regard to the various designations before them. Particular emphasis is placed upon the protection of internationally important sites, with provisions of the Habitats and Birds Directives explicitly referred to in para.8. Proposals affecting SACs and SPAs must be considered in the light of obligations imposed by the Habitats Directive; para.37 directs planning authorities to the appropriate procedures within this and the C(NH)R1994, and indeed these should be reflected in structure, development and local plans. Furthermore, when considering proposals affecting potential European sites whose details have been forwarded to the European Commission, para.13 requires that such habitats must be treated in the same way as those whose classification is complete. Government policy thus pays great heed to sites qualifying for European site status; a theme evident throughout the guidance.

PPG9 also extends to nationally important habitats, though with much less enthusiasm than in respect of internationally significant ones. Planning authorities must have regard to the national significance of NNRs when balancing development against conservation interests, although such applications will usually be called-in (para.36).

The extraction of minerals<sup>166</sup> underlying habitats has potentially grave environmental consequences, and this is acknowledged by the guidance. Such

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<sup>165</sup> This reflects the obligation in Art.10 Habitats Directive -- see Reg.37 C(NH)R 1994.

<sup>166</sup> See also Minerals Planning Guidance Note 6, April 1994 (paras. 72-74); London: HMSO.

proposals affecting SSSI must be subject to rigorous examination; still more stringent requirements apply where the site is also a SPA, SAC or Ramsar.<sup>167</sup> Ultimately, the need for the mineral must be balanced against environmental considerations, and where consent is granted conditions will normally be attached to both the winning of mineral and restoration of the site subsequently; para.40.

PPG9 favours a restrictive approach in the extent to which nature conservation ought to be allowed to interfere with development; and indeed para.18 stresses the need to avoid unnecessary constraints in this ambit. Planning authorities are urged generally to consider the use of conditions to mitigate habitat damage; and where these do have a role to play consent should not be declined on ecological grounds (para.27). In any event planning permission ought to be granted wherever other factors outweigh conservation considerations; implicit in this approach is the fact that there are circumstances in which destruction of habitats -- even internationally significant ones -- may be justified.

#### 4. Environmental Impact Assessment

Crucial to development decisions over habitats is the anticipated impact of projects upon the scientific interest in question. Ascertaining this has always been a fundamental part of planning authority responsibility.

In recent times there have been measures to formalise this process; in particular EC Directive 85/337 on the assessment of the effects of certain public and private projects on the environment<sup>168</sup> was introduced entirely to facilitate prior formal assessment of environmental effects<sup>169</sup> -- a process known as EIA. It applies to both public and private projects<sup>170</sup> with likely significant impact on the environment; Art.1. These must be assessed under Art.2 before planning permission is granted, with a view to identifying both the direct and indirect effects upon, inter alia, fauna and flora, soil and water and the interaction of such factors (Art.3).

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<sup>167</sup> C10 Annex C.

<sup>168</sup> O. J. L2/175/40; as amended by EC Directive 97/5011; O. J. L73/5.

<sup>169</sup> Such assessment was also a requirement of the later 'Biodiversity Convention'; see p.42 above.

<sup>170</sup> Though not those adopted by specific national legislation; Art.1(5).

The test in Art.1 of the Directive: 'likely significant environmental effects', is further refined so that not all developments that appear to satisfy this general definition are subject to assessment. The applicability of EIA is determined by the type of project in question: those listed in Annex I (such as motorway construction and trading port development) are subject to Art.4(1) and must be assessed. Those listed in Annex II (such as mineral extraction and urban development) are subject to Art.4(2) and will be assessed only where States consider such action appropriate.<sup>171</sup> Furthermore, Art.4 provides that States are ultimately empowered to specify the Annex II projects subject to EIA, and additionally to establish criteria with which to determine the applicability of Annex II. The Convention is thus extremely flexible in the means by which its requirements may be implemented.

Clearly, the quantity and quality of information supporting EIA is crucial to its effectiveness as a planning instrument. This is governed by Art.5, which provides that the developer must supply the data<sup>172</sup> necessary for assessment to be undertaken. Annex IV contains guidance on the type of information relevant, which includes: details of the project itself, alternatives considered by the developer, environmental impact and mitigation measures. Data thus supplied must be taken into account in considering the planning application (Art.8); and those exercising environmental responsibilities affected by the project must be identified and consulted during this process under Art.6. EIA therefore serves to place the fullest relevant information available before the planning authority, and ensure it is accommodated within the planning process.

However, not all developments with potential environmental impact will benefit from assessment; as a project may exceptionally be exempted from EIA under Art.2(3) of the Directive. In this event a Member State must consider the benefits of some other form of assessment, make public the reasons pertaining to the exemption and inform the European Commission of such reasons before consenting to the project.

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<sup>171</sup> i.e. Where significant environmental effects are anticipated.

<sup>172</sup> Including a 'non-technical summary'; Annex IV, para.6.

EC Directive 85/337 was given direct effect within the UK by the enactment of The Town and Country Planning (Assessment of Environmental Effects) Regulations 1988.<sup>173</sup> S.71A TCPA 1990 permits regulations to be made to extend the requirements of environmental assessment in this field. However, the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 directly incorporate various Articles of the Directive. Thus Reg.4 requires the consideration of environmental information as a pre-requisite to granting planning permission -- the decisions of the Secretary of State or inspector being open to challenge on such grounds under Reg.25. The types of project which fall under the EIA requirements of Reg.4 are listed in Schedules 1 and 2; which reproduce the contents of Annexes I and II respectively -- Schedule 2 is relevant only where the development in question would be likely to have significant effects on the environment by virtue of factors such as nature, size and location.

In the UK, the data required to undertake EIA is submitted by the developer in the form of an environmental statement (ES); and a Schedule 1 or 2 application not accompanied by an ES will result in a request by the planning authority to rectify this under Reg.9. The content of the ES must conform with Schedule 3,<sup>174</sup> which requires such information as a description of the work and likely impact, mitigation details, a non-technical summary and indeed data facilitating the assessment.<sup>175</sup>

The mechanics of assessment and collection of information supporting it clearly represent an expensive and time consuming aspect of the planning process. For this reason a prospective developer may seek the planning authority's opinion as to the applicability of EIA under Reg.3 Town and Country Planning (Environmental Assessment and Permitted Development) Regulations 1995.<sup>176</sup> An opinion thus obtained may be referred to the Secretary of State by an applicant under Reg.4 for the former's consideration.

<sup>173</sup> SI 1988, No.1199 as amended by: SI 1990/367, SI 1992/1494, SI 1994/677 and SI 1996/972; see also: The Town and Country Planning (Environmental Assessment and Permanent Development) Regulations 1995 (SI 1995/417); p.52 below) and The Town and Country Planning (Environmental Assessment and Unauthorised Development) Regulations 1995 (SI 1995/2258).

<sup>174</sup> Which corresponds to Annex IV to the Directive.

<sup>175</sup> The local planning authority, Secretary of State or inspector may require further information in addition to the ES; Reg.21(2).

<sup>176</sup> 1995, No.417.

In any event, the Secretary of State is empowered to rule that a proposal satisfying Schedules 1 or 2 does not require EIA due to its being exempt or not falling within the definition of 'development'; Reg.14(2) TCP(GDP)O 1995<sup>177</sup> This provision takes advantage of the Art.2(3) exemption within EC Directive 85/337, and introduces considerable flexibility into EIA. It also represents a means of circumventing EIA, thus denying its benefits to the decision-making process.

### **Enforcement and Challenge**

The overlapping web of protective laws generates a myriad of enforcement procedures, involving the NCC, European Commission<sup>178</sup> and various international organisations. However, of equal importance to habitat protection is the enforcement of planning law; which ultimately relies upon enforcement notices pursuant to ss.172-173 TCPA 1990.<sup>179</sup> These address those situations in which development proceeds without consent.

However, the enforcement of habitat protection law also depends upon the challenge of planning decisions taken in breach; usually brought by voluntary conservation groups. In this context the publicity ensured by compulsory entry in a public register under s.69 TCPA 1990 is important. Such challenge to the exercise of administrative power, known as judicial review, must follow a specific procedure -- which involves obtaining leave and adhering to time limits. To satisfy the pre-requisite of leave, application is made ex parte to a single High Court judge under s.31(3) Supreme Court Act 1981 (SCA 1981). However, this is not necessary where challenge is by way of the standard 'six weeks' procedure'; an example being s.288 TCPA 1990. S.288 facilitates High Court challenge to planning decisions of the Secretary of State, local authority and inspector. It is not a re-examination of the issues -- merely an investigation into whether the action

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<sup>177</sup> 1995, No.419.

<sup>178</sup> See below, p.56.

<sup>179</sup> Non-compliance with which entitles the local planning authority to directly enforce the law -- s.178; although their issue may be subject to Secretary of State appeal.

taken was within the powers conferred by statute. Thus, 'any person aggrieved'<sup>180</sup> may bring such a challenge, and if so within six weeks.

The wider powers of judicial review may be invoked under the procedure contained within Order 53 Rules of the Supreme Court (RSC)<sup>181</sup> and s.31 SCA 1981. Unlike review under s.288 TCPA 1990, this is not restricted to evaluating the legality of individuals' actions. Time limits are important here: s.31(6) SCA 1981 providing that the court can refuse leave, or indeed the relief sought, in the event of undue delay where it feels relief would be likely to cause hardship, prejudice rights or be detrimental to good administration. This provision is without prejudice to other time limit rules; in particular Order 53 r.4 RSC requires an application to be made promptly and in any event within three months from the date when grounds for the application arose -- although the court can extend this period. The practical effect of these provisions is summarised in the case of *Caswell v Dairy Produce Quota Tribunal*:<sup>182</sup> leave may be refused where an application is not made promptly, and in any event within three months, unless the court is satisfied of a good reason to do otherwise. Notwithstanding such good reason however, leave and relief may still be refused where its granting would be likely to cause hardship or prejudice, or interfere with good administration.

An applicant must additionally have locus standi; i.e., an interest in the exercise of power challenged.<sup>183</sup> This requirement of sufficient interest may be pitched at a different level, depending on the remedy<sup>184</sup> sought. Also, as it can be adequately determined only in the context of the wider application itself, this issue cannot usually be treated as a preliminary matter because full details are not before the court on an application for leave. Thus, sufficient interest is a relevant factor to determining the application itself.<sup>185</sup> It ultimately depends upon various factors, such as the terms of the legislation in question and the nature of the act

<sup>180</sup> A term including both those aggrieved in the ordinary sense of the word and those who made representations at inquiry; *Turner v Secretary of State for the Environment* (1973) 28 P&CR 123.

<sup>181</sup> These are made under s.84 SCA 1981 -- see SI 1965 No.1776 as amended; Order 53 is now in the form prescribed by SI 1977 No.1955.

<sup>182</sup> [1990] 2 AC 738.

<sup>183</sup> See Ord.53 r.3 RSC & s.31(3) SCA 1981.

<sup>184</sup> *IRC v National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617.

<sup>185</sup> D. Foulkes, *Administrative Law*- 8th ed., London: Butterworths, 1995, p.356.

leading to the complaint.<sup>186</sup> In the planning context, both an amenity society<sup>187</sup> and rival developer<sup>188</sup> have been held to have sufficient interest; as well as the actual participants in the development.<sup>189</sup> Each application will turn upon its own facts.

Where an applicant satisfies the requirements for judicial review, any remedy granted to him is entirely at the court's discretion. There are three prerogative orders available -- only in respect of the exercise of public power -- and these may be supplemented with declarations or injunctions;<sup>190</sup> available to both the public and private ambits. The court may grant certiorari to quash an unlawful decision; although this is not a substitution of the court's decision for that of the body in question. It may also grant a prohibition, to prevent a body from acting unlawfully; thus restraining the continuation of unfair procedure.<sup>191</sup> The third prerogative order is mandamus, which compels the performance of a duty on pain of contempt of court.<sup>192</sup> Additionally, declaration is available -- a means of clarifying parties' legal rights. This remedy has no coercive force; unlike an injunction, which requires a party to refrain from acting (or more rarely to undertake positive action). The court is also empowered, in an application for judicial review, to award damages<sup>193</sup> in addition to the above remedies.

Thus, where the court is faced with unlawful action by a public body, it has an arsenal of potential remedies on which to rely. Flexibility is ensured by the possibility of combining such remedies; for example, the court can quash a decision via certiorari and by mandamus order its re-consideration. However, in addition to the discretionary nature of these remedies, it is extremely difficult in practice to establish something capable of vitiating the decision of a public body.<sup>194</sup>

<sup>186</sup> See *IRC v National Federation of Self-Employed & Small Businesses Ltd.* [1982] AC 617.

<sup>187</sup> *Covent Garden Community Association v GLC* [1981] JPL 183.

<sup>188</sup> *R v Canterbury City Council, ex p. Springimage Ltd.* [1994] JPL 427.

<sup>189</sup> *R v Camden London Borough Council, ex p. Comyn Ching & Co. (London) Ltd.* [1983] 47 P & CR 417.

<sup>190</sup> See s.31(2) SCA 1981.

<sup>191</sup> *R v Liverpool Corporation ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299.

<sup>192</sup> See *R v Poplar Borough Council ex p LCC (No.2)* [1922] 1 KB 95.

<sup>193</sup> s.31(4) SCA 1981.

<sup>194</sup> See *R v Poole Borough Council, ex p. Beebe et al.* [1991] J.P.L. 643.



Where the provisions in question are European, issues of Community law enforcement also arise. The basic principle here is that, in the absence of specific Community rules, national remedies should be sought.<sup>195</sup> A UK plaintiff should therefore seek judicial review. However, the European Commission and Member States also have a potential involvement in law enforcement. Art.169<sup>196</sup> facilitates action by the Commission against a Member State for failure to fulfil a Community obligation. Action may also be brought by another State under Art.170;<sup>197</sup> although this has proceeded to judgment only once thus far.<sup>198</sup> There are three stages in Art.169 enforcement: formal notice from the European Commission to the State, allowing two months for observations to be submitted; the Commission's reasoned opinion as to breach; and ultimately, referral to the ECJ where the State fails to comply. Where settlement is reached during the proceedings, the action will be formally withdrawn. If not, the ECJ will rule upon the infringement of Community law and the State will be obliged to comply with this judgment.<sup>199</sup>

In respect of breaches, the European Commission's main source of information is complaints; which may be raised by individuals. However, a complainant cannot force the Commission to launch, or indeed continue, enforcement proceedings;<sup>200</sup> the latter thus enjoys in practice a degree of discretion in enforcement.

Finally, a provision that plays an important role in the enforcement and challenge process is Art.177.<sup>201</sup> This empowers a national court faced with a problematic Community law issue to seek a preliminary ruling from the ECJ. Discretion here is upon the national court alone; it is not obliged to refer at the parties' request. However, where that court is one from which there is no appeal,

<sup>195</sup> C-33/76 *Rewe-Zentralfinanz and Rewe-Zentral v Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

<sup>196</sup> The following Article references are to Part 5 Treaty Establishing the European Community; 25 March 1957; see 'Treaties Establishing the European Communities', London: HMSO; Cmnd. 455, 1988, (Art.169 @ p.135).

<sup>197</sup> *Ibid* @ p.135.

<sup>198</sup> In C-141/78 *France v UK* [1979] ECR 2923.

<sup>199</sup> Failure to comply would lead to a second judgment; through which a lump sum or penalty payment could be imposed -- Art.171 (Cmnd.455, 1988 @ p.136).

<sup>200</sup> C-48/65 *Lutticke v EEC Commission* [1966] ECR 19.

<sup>201</sup> Cmnd.455, 1988 @ p.137.

it must refer -- unless the issue has already been decided by the ECJ or the correct application of law is so obvious as to leave no reasonable doubt.<sup>202</sup> Art.177 provides a vital link between the national courts and the ECJ and is of crucial importance to the enforcement process.

## Conclusion

An explanation of the area of interaction between wildlife law and planning generates several observations. The most obvious is the substantial degree of overlap between the various protective provisions. Some of these are of direct relevance, others less so; some permit derogation only very exceptionally and then require compensation, others are little more than a means of bringing ecological significance to the attention of planning authorities. Whilst European provisions offer better protection from development, all are of benefit to nature conservation.

Conservation law must be assessed in the context of the planning mechanism with which it dovetails in protecting habitats from harmful development. There is enormous reliance upon the controls and safeguards of town and country planning; demonstrated by the fact that planning permission may excuse harmful activities over SSSI under s.28(8)(a) WACA 1981.

Of great practical importance are enforcement provisions and the law governing challenge within the planning ambit. It is clearly vital to the interests of habitats that protective laws are capable of being properly enforced. The lack of an obvious complainant with a vested interest in habitat preservation brings a unique dimension to enforcement in this field; voluntary conservation organisations play a crucial role here. This will be seen in the following chapter, which presents the research findings and facilitates an evaluation of the legal and regulatory processes outlined above.

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'Acte clair' -- see C-283/81 CILFIT v Ministero della Sanita [1982] ECR 3415.

## Chapter 4:

### **CRITIQUE**

#### **Introduction**

Evaluation of the legal protection of habitats from harmful development demands both an analysis of relevant planning decisions, and investigation of the litigation and complaints' processes.

This chapter combines research findings with a general critique of the current protective regime, reflecting the underlying critical stance of this work. However, laudable elements of that regime are acknowledged; appearing in the first section of the chapter.

Thereafter, critique of the NCC and designating law precedes treatment of research into the general planning process; the latter supported by criticisms of planning guidance and EIA. Then the principal emphasis of the research is discussed: enforcement and challenge; which includes the detailed studies of Cardiff Bay Barrage and Lappel Bank.

Finally, this large single chapter is closed with a brief summary of the various strands of criticism explored.

#### **Effective Wildlife Law**

The critical approach of this paper must not be allowed to obscure those commendable aspects of relevant law. The establishment of an independent NCC, with advisory and management responsibilities over habitats, has been crucial to the successful administration of protective law. Indeed, its continued pivotal position within wildlife legislation is reflected by its responsibilities under our most stringent protective provisions; those relating to European sites.<sup>203</sup>

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See e.g. Reg. 18(2) C(NHR) 1994.

The emergence of European environmental law is one of the most significant developments of conservation jurisprudence, with the Habitats and Birds Directives aspiring to permanently preserve a network of our most important habitats. Designation determined wholly by ecological criteria,<sup>204</sup> and supported by very restrictive controls equates to the greatest level of habitat protection reasonably practicable. Indeed, European law may also extend restrictions to land surrounding habitats. For example, in April 1995 the Secretary of State for the Environment refused consent for residential development of a site adjoining a proposed SPA in Yateley, Hampshire; on the grounds that this would add significantly to recreational pressure on the SPA, thereby threatening the breeding success of nightjar, woodlark and Dartford warbler.<sup>205</sup>

Furthermore, the compensation requirements attending exceptional destruction of European sites ensure that the Natura 2000 network remains intact, even if actual constituent sites alter over time. This notion of a permanent habitat network is a vital commitment to practical conservation in this era of increasing land pressure, and points the way forward in the conservation-development relationship.

### **Nature Conservancy Council**

Notwithstanding the valuable conservation work undertaken by the NCC, its effectiveness is inherently limited. In particular, its dependence upon public funds represents an impediment to genuine independence. Furthermore, there have even been suggestions<sup>206</sup> that the NCC has suffered at the hands of political masters consumed by improper motives. However, it remains theoretically free to raise objections and criticise government policy, and indeed government-backed developments; but its practical ability to influence decisions inevitably depends upon its resources. The NCC, as a public sector institution, has not escaped the

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<sup>204</sup> R v Secretary of State for the Environment ex p. RSPB [1997] 4 JEL 139; see below pp.97-109.

<sup>205</sup> RSPB; 'Conservation Planner 6,' Sandy: RSPB, 1996.

<sup>206</sup> By Mr Davies in Parliament over the conduct of Mr Redwood, Welsh Secretary, in relation to the Countryside Council for Wales; HC Debs. March 2 1995, Vol.255, Col.1232.

restrictions on public spending of the 1980s and 1990s; it is thus unable to actively take an interest in *all* planning cases in which important habitat issues arise.

It is submitted that resource shortfalls prevent the NCC from discharging its legal responsibilities. In the planning cases analysed, it very rarely even commented unless a nationally designated site was involved. Thus, decisions concerning important natural habitats that are not yet designated do not generally have the benefit of NCC input; notwithstanding its responsibility to give general advice on nature conservation to local authorities,<sup>207</sup> and guidance on the need to acknowledge the importance of nature conservation outside designated sites.<sup>208</sup> The planning authority in such cases must rely heavily upon their own ecologist -- if one is appointed; an onerous responsibility indeed for that officer. This is illustrated by the case of Wraggs Quarry, Derbyshire. Notwithstanding the considerable ornithological importance of the proposed development site, no comment was made by the NCC. The Peak Park Planning Board's ecologist, who concluded that the proposal would not have a significant detrimental effect upon the habitat, therefore had a crucial input to the eventual decision to grant consent in September 1996.

Even where the NCC is prepared to oppose developments, the extent and nature of such opposition are determined by its resources. In almost all cases studied where the NCC took an active interest, it aspired towards compromise from the outset. Whilst compromise is a worthy aim of planning, not least in the current climate of intensified pressure of competing uses, there will inevitably be occasions where the nature conservation interest ought to be regarded as having priority; and a proposal rejected on the basis of unacceptable habitat impact. It would be naive to impute to developers the public spirit and local environmental awareness necessary for site avoidance or application withdrawal where the ecological importance of a site becomes apparent. It thus falls to the NCC, as official conservation body, to act as guardian of habitats; making representations to the planning authority as the circumstances demand. An unflinching attitude of

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Para. 10 PPG9.

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Para. 14 PPG9.

compromise, from which a certain amount of habitat loss or damage is inevitable, is inconsistent with this duty.

The NCC's attitude to a proposal to develop the largest colony of Great Crested Newts in the UK, near Peterborough, demonstrates this. Notwithstanding this species' status as a 'European Protected Species' in Annex IV(a) Habitats Directive,<sup>209</sup> the NCC formally considered designation as a SSSI only in May 1995,<sup>210</sup> coinciding with the controversial development proposal. The timing of designation betrayed its real purpose as a bargaining tool, as the NCC shortly thereafter concluded an agreement with the developers providing for half of this habitat to be destroyed. The resulting habitat creation measures, not without risk themselves, could not condone the NCC's failure to protect an endangered species' largest habitat from partial destruction.

Such apparent inability to contemplate total opposition to development proposals also extends to high profile internationally important habitats. The Cairngorms, the last area of genuine wilderness in Britain, were the subject of a proposal to replace a 1960s down-hill ski development with modern facilities; thus greatly increasing potential visitor numbers. The development site adjoined, in addition to a NNR and SSSI, a candidate SPA and possible SAC.

It was envisaged to replace the ageing equipment with a funicular railway, appropriate for transporting large numbers of non-skiing visitors to the summit of Cairngorm. This would be supplemented by increased visitor facilities; aiming to attract over 225,000<sup>211</sup> people per year during the summer months. This substantial increase in non-skiers visiting areas adjacent to internationally important habitats generated much controversy; including NCC objections on the grounds of unacceptable impact on habitats. Such objections, pertaining to erosion and vegetation loss due to visitor pressure and construction, were echoed by many conservation groups and individuals. Also raised were doubts over proposed habitat reinstatement -- due to the altitude; and over the effectiveness of

<sup>209</sup> And thus in Schedule 2 C(NH)R 1994.

<sup>210</sup> See J. Theobald 'Colonial Struggle' *The Guardian* 10.5.95.

<sup>211</sup> The applicants' own figures of 225,000 - 250,000 represent the projected annual summer usage; adopted in the planning summary by the Highland Regional Council; Planning Committee 4.3.96, BS/1994/254: 'Application for Planning Permission for a Funicular Railway and Related Development at Cairngorm'.

subsequent monitoring. Kincardine and Deeside District Council feared that restricted access from the summit station, a vital environmental protective measure, could prove too onerous if actual financial returns fell short of those anticipated. However, further discussion between the planning authority, developers and landowners; and the adoption of a visitor management plan; eventually led to the NCC supporting the development. Notwithstanding other objections, not least from the RSPB as conservation experts and adjoining landowners, this was enshrined in an agreement under s.50 Town and Country Planning (Scotland) Act 1972, to which the NCC was bound via s.49A Countryside (Scotland) Act 1967. The Scottish Secretary, Mr Michael Forsyth, had declined to call-in the application, thus terminating objectors' hopes of further effective opposition.

The planning authority accepted<sup>212</sup> that, in view of the requirement to maintain the European site at a favourable conservation status, increasingly substantial investments would be required for environmental management if the 1960s' development remained un-improved. The funicular proposal was a means of generating these extra funds. Of course, by implication a termination of skiing activity entirely and suitable management would also achieve favourable conservation status; however, it is submitted that the NCC did not seriously contemplate opposing these proposals. Indeed, the replacement of old skiing equipment would have been a convenient juncture at which to rectify the harmful 1960s' development by pressing for an end to skiing on the mountain. The planning authority, with its own agenda of local economic health to promote, was never likely to raise this issue. Whilst such an outcome is perhaps unrealistic, the significance of the habitat justified its being raised; only the NCC was in a position to do so, and it failed.

Financial limitation within the NCC was a factor alluded to by Mr Williams<sup>213</sup> of that organisation. He conceded that resource constraints did indeed interfere in his ability to partake in planning cases. Whilst funds could be sought from central

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<sup>212</sup> Planning Committee 4.3.96, BS/1994/254: 'Application for Planning Permission for a Funicular Railway and Related Development at Cairngorm'; para. 9.10.

<sup>213</sup> Interview with Mr R. Williams of English Nature; Peak District & Derbyshire Team; 21.2.97.

office, scarcity of staff generally discouraged involvement in planning enquiries. A case could clearly involve staff in lengthy proceedings; prudence therefore discouraged involvement unless this was unavoidable.

Intervention was therefore a matter of NCC discretion. Mr Williams referred to a case of 1990 in which it was decided not to oppose the fragmentation of a SSSI by an extension of the A564 in Derbyshire. The NCC merely submitted brief written evidence seeking mitigation and did not appear at the Public Inquiry. Mr Williams conceded that the NCC should, in principle, have objected to this clear case of loss. However, a cost/benefit analysis dictated that this was not viable -- expectations of success against the Department of Transport were not high. Notwithstanding the active opposition of Derbyshire Wildlife Trust, the development proceeded; although the NCC won substantial mitigation.

However, even where the NCC's objections to a proposal prevent it remaining passive, its advisory relationship within the planning process restricts its influence over the decision. Indeed, its advice to government departments, Ministers and developers is often ignored, and sometimes even contradicted or opposed.<sup>214</sup> It is, at best, an influential voice to be heard in the overall planning process; no more than one strand of argument. Over proposals to develop Selar Farm Grasslands SSSI in 1994, its objections proved futile. A request to the Secretary of State to call-in the application was denied and consent granted. Strong representations from the NCC, including opposition on scientific grounds to the mitigation proposal, had no impact upon the planning decision; nature conservation is merely one land use to be considered by an authority composed entirely of lay members. In such a scenario, the official conservation body's powers and resources are wholly inadequate to fully represent the conservation interest. The only effective check upon developers' abuse of economic power in this ambit comes from voluntary conservation organisations.

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M. Havard & P. Ferns; 'Cardiff Bay: a cautionary tale', ECOS 14(2) 1993, p.51.



## Designating Law

The loophole within s.28(8) WACA 1981, whereby planning permission excuses otherwise forbidden activities in respect of SSSI, places great faith in the planning system. It embraces an assumption that that system is capable of accommodating nature conservation, and reduces the NCC to an advisory role -- even where proposals threaten to destroy a site for which it otherwise has responsibility. Such an arrangement potentially undermines designation of habitats, because there can be no guarantee the conservation interest will be adequately considered by the planning authority.

However well-intentioned an authority's conservation policies are, these cannot be entirely insulated from political influence. Indeed, its approach to planning is moulded by central planning guidance. Planning authorities must actively consider all relevant factors, and nature conservation should not be accorded greater significance relative to other considerations. In any event the ultimate decision is taken by non-specialist authorities driven by their own objectives for the well-being of the area. Economic and social considerations are never far from the minds of reasonable authorities. It is therefore unsurprising that development continues to claim important habitats, decades after legislative attempts to preserve wildlife were introduced.

As the basis of nature conservation in the UK, all nationally and internationally designated habitats -- whatever other classifications they concurrently hold -- are SSSI. Indeed, the law protecting habitats is complex, with a plethora of potentially overlapping designations. This inevitably results in a hierarchy of sites, with European ones at the top, and habitats of local significance at the bottom; those without formal designation represent an underclass within the planning and conservation relationship. Inevitably, planning authorities will feel more disposed towards sanctioning the development of domestic sites than European sites; a fact not likely to be lost on developers. There may be at least a sub-conscious influence on authorities where sites lower down the hierarchy are the subject of planning applications. Thus, the hierarchical structure of designation

fuels the phenomenon referred to by Owens<sup>215</sup> as the inexorable erosion of lesser sites.

Hierarchical problems are compounded, and clarity frustrated, by the overlapping nature of designation. This confuses decision-makers attempting to follow planning advice.<sup>216</sup> Furthermore, whilst all SSSI are equal under law, those with European site status must be positively managed in the interests of conservation. This uneasy distinction threatens the integrity of the national SSSI network, conflicting with the rationale behind Huxley's<sup>217</sup> recommendation of a single system of sites to preserve wildlife. Also, whilst compensatory measures attend the exceptional development of European sites, no such requirements govern the development of nationally important habitats. In none of the planning decisions studied involving SSSI did the authority even refer to the fact that loss of one site would corrupt the national network; compensation measures adopted were never done so on the basis that the ecology lost should be wholly reproduced. The law on domestic designation thus fails to reinforce what is essentially a *network* of habitats vital to the sustainability of flora and fauna.

### The Planning Process

An examination of planning decisions where nature conservation is a factor permits an evaluation of the extent to which the latter influences those decisions. Ultimately this aspect of the study considers how much weight planning authorities give to ecology relative to other considerations; and how well habitats fare under this process.

In reaching decisions, pragmatic factors were generally very influential. This is not necessarily consistent with due consideration of conservation issues; but authorities can be expected to favour outcomes that are practically acceptable to their constituents at large. Practical issues guided the Planning Board in the case

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<sup>215</sup> S. Owens; 'Planning and Nature Conservation - the Role of Sustainability'; ECOS 14 (3/4) 1993 15, @ p.19.

<sup>216</sup> E. Bichard and P. Davies, 'Appraisal of Major Hazards in Environmental Statements: The Assessor's Dilemma'; JPL August 1997 706 @ p.709.

<sup>217</sup> Cmnd. 7122, 1947; whilst this initially concerned NNRs (p.17), SSSI (p.69) have subsequently come to share this function; see also p.19 above.

of Mandale Rake, Derbyshire; which concluded that an application to extract fluorspar via open cast mining simply could not be resisted. This refusal to consider the proposals with an open mind overrode the ecological significance of the unimproved grassland and indeed Ashford residents' concern over the generation of heavy goods traffic. Consent was duly granted in January 1997.

In all cases, the attitude of individual authority members will be instrumental; a factor that cannot be legislated for. Indeed, planning is traditionally a process generating local hostility and controversy. Such was the effect of comments made by David Buckle, Chief Planning Officer of Stroud District Council. These concerned proposals to create a residential and industrial settlement within an AONB in the Cotswolds. Although local opposition was largely on landscape grounds, the proposed site was also of ecological significance due to the presence of unspoilt meadow. At a meeting of the Planning Committee, an objector complained that developing an AONB would mean nowhere was safe. Buckle replied that 'we already can build where we like'.<sup>218</sup> Whilst this inflammatory response over-simplified the relationship between designation and development, it also betrayed a disturbing approach to the exercise of wide discretion. Such an attitude to designated sites is potentially very damaging to conservation.

Occasionally, local opposition may be sufficiently organised and stentorian to prevail in a planning dispute; a factor of increasing importance in the current era of NCC impotence. Proposals to build a fifth London airport within the Vale of The White Horse, Oxfordshire, were abandoned in 1995 in response to vociferous local objections. Such action, which in this case saved thousands of hectares of meadow and woodland, including the important Ock plain, is vital to influencing the political dimension that is always proximal to the decision-making process in this field.

It is doubtless tempting for a planning authority to allow itself to consider factors not strictly relevant to the merits of an application. This is illustrated by the case of Winster Bank, Derbyshire; where the Planning Board sought to avoid the difficult decision which full consideration of the facts would have demanded. Permission was sought to renew previous consent for fluorspar extraction;

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D. Hart-Davis, 'Valley in the shadow'; *The Independent*, 14.6.97.

threatening to harm wildlife that had colonised the area during its dormancy. The prevailing influence here is evident from the acknowledgement in the file that refusal of consent would probably lead to 'an appeal...[and] enforcement action which itself may take time to resolve'. Such observations, however accurate, have no place in the consideration of a planning application; which should proceed exclusively upon its merits in the context of the target site. Also, whilst the District and Parish Councils emphasised the need to take account of wildlife, the Planning Board regarded the main issue as likely landscape impact. In an undesignated site such as this, it is perhaps unsurprising that this was where the national park authority's loyalties lay.

However, examination of Wear Valley District Council's planning register for non-designated habitats revealed the same disposition. Reclamation of land at Leasingthorne Colliery, Co. Durham, necessitated felling existing woodland. Whilst provision was made for habitat creation, this was entirely driven by concern for visual amenity. Indeed, landscaping was a major consideration in all applications with habitat impact. Conditions to replace felled trees at Edmundbyers and Crook were attached to planning permission wholly for landscape reasons; coincidental ecological benefits were not even referred to. The concern for visual amenity manifested itself in an almost routine consideration of landscape issues; an outline application for residential development at Coundon was accepted on condition a scheme of re-planting was given prior approval. This strict approach is clearly of indirect benefit to wildlife, as schemes for re-planting ensure at least the continued presence of flora. Furthermore, the customary consideration of landscape impact outwith national parks and AONB provides a valuable blue-print for such treatment of ecological considerations outside designated habitats -- provided of course the necessary political support for this can be raised.

However, indirect ecological benefits may be minimal, as measures determined by landscape considerations will not necessarily be consistent with habitat requirements. Also, it was apparent that Wear Valley's preoccupation with visual amenity sometimes obscured ecological issues. An application to construct a road at Low Willington raised landscape concerns over trees and hedgerows.

The Environment Agency requested, in the interests of conservation, that the authority discourage the developer from culverting a section of stream. Consent was granted in August 1996 with strict conditions on landscaping; but there were no conditions attaching, or indeed any references to, culverting. Similarly, a proposal to construct the West Auckland bypass involved developing a disused railway partially covered with naturally regenerating birch and willow; construction would destroy much of the scientific interest. An ecological study recommended preserving as much of the existing flora as possible. In approving the scheme, the Planning Committee meeting of 24 September 1997 recommended several landscape measures; vegetation that was preserved was done so for visual reasons and very little heed was paid to the habitat recommendations.

It was clear that, providing the target site was un-designated, landscape impact represented the overwhelming ancillary concern; notwithstanding any ecological interest. Wear Valley was therefore no less concerned with the amenity dimension of the countryside than the Peak Park Planning Board. Its approach demonstrates that, unless a site has SSSI designation, scant attention will be paid to ecological impacts. Whilst this attitude testifies to the significance attached to formal designation, it conflicts with the emphasis in official planning guidance<sup>219</sup> on the importance of nature conservation outside designated sites.

In the ethos of compromise pervading the planning system, conservationists must make concessions in order to maximise their realistic expectations. These tend to establish precedents; ultimately becoming a further permanent hurdle that the conservation cause must clear. Such a precedent was set in the case of Thrislington Quarry, Co. Durham; in all other respects an example of successful co-operation between developers and conservationists.

Capable of producing the best quality dolomite in the UK, Thrislington was included in the County Council development plan as a dolomite reserve area. The site was also the best example of magnesium limestone grassland in existence. Whilst the NCC was aware from the outset that Thrislington would ultimately be quarried, it was felt that its ecological value justified recognition as a SSSI; if only

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See para.14 PPG9; and p.49 above.

temporarily. The developers were confident of obtaining consent for continued expansion as the quarrying progressed; indeed, an extension had been granted in 1970 on the understanding it would be very difficult to refuse consent for extraction at any time in the future.<sup>220</sup> Thus, as quarry workings approached the SSSI, the only option available to conservationists, after their attempts to purchase the land failed, was negotiation to safeguard the ecological interest.

By the late 1970's experiments were taking place with translocation of the vegetation, a method pioneered by Dr David Bellamy involving cutting 1' square turves and planting them, in their original order, at an alternative site. Although the NCC remained unconvinced that translocation could meet the fundamental requirements of nature conservation, it was included within the developers' mitigation proposals. At the Local Inquiry that commenced on 7.4.81, the short-term need for dolomite and quality of that present at Thrislington were emphasised as being prevailing factors; the latter precluding consideration of an alternative site. The inspector considered the likelihood of future workings influencing the site, a factor known by the NCC at notification, to be relevant; and that the NCC's objections would be overcome by the developers' willingness to adopt modified working methods. He also noted that the SSSI had deteriorated and lacked positive management at the time of the Inquiry.<sup>221</sup> During the Inquiry the planning authority concluded an agreement<sup>222</sup> with the developers to establish a nature reserve on undeveloped land and translocation of vegetation into it. The NCC expressed reservations about translocation; including the inherent difficulty in placing turves in the same relationship as previously, the risk of introducing alien species with the soil infilling required in the interstices of turves and the potentially slim likelihood of recreating the microtopography of the donor area. However, as it represented the only viable conservation option for a site whose development was settled, translocation commenced.

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<sup>220</sup> This opinion of the planning officer, contained in a letter of 20.3.62, was based on the demand for, and limited supply of, dolomite.

<sup>221</sup> Indeed, there are problems in relying upon the future potential of a site for its SSSI status; see *R v NCC ex p, Bolton B.C.* [1996] J.P.L. 203.

<sup>222</sup> Under: s.126 Housing Act 1974 re. translocation; and s.52 Town and Country Planning Act 1971 re. controlling the excavation of mineral from the extended quarry.

The developers took their responsibilities seriously, appointing a resident ecologist and funding conservation management. The process, although time-consuming, ultimately proved successful. The new site sustained all one hundred and forty plant species of the original, plus the Castle Eden argus butterfly which had also been displaced. Indeed, recognition of the ecological importance of the translocated habitat came with designation as a NNR and proposed SAC status.

Whilst Thrislington demonstrates that SSSI are not inviolable, its successful use of translocation has also set a dangerous precedent. Developers and planning authorities alike have since grasped the measure to facilitate development of ecologically important target sites. As a result, in situ protection has become a less feasible option. The danger is that translocation is unlikely to be as successful elsewhere as it was at Thrislington. This was a special case, where the best example of rare magnesium limestone grassland coincided with the only known supply of magnesium limestone sufficiently pure for use in the sea-water magnesium extraction process; a process undertaken by only one company in an economically depressed area. Planning and execution of the translocation itself benefited from vast resources, and both donor and receptor sites, merely eight hundred metres apart, shared the same geology. In 1993<sup>223</sup> the NCC confirmed the view that translocation is not an acceptable alternative to in situ habitat conservation; rather a measure of last resort preferable to total loss. It is likely to result in a considerable reduction in the conservation interest of a habitat, as the original species composition at the donor site is unlikely to be maintained at the receptor site.<sup>224</sup> This view is still maintained by the NCC, whose current policy is to oppose such measures.<sup>225</sup> However, translocation was regularly proposed -- and when so, adopted -- within the cases studied during this project. Thus, the enduring legacy of Thrislington has been the practice of proposing translocation in ESs to ensure proposals purport to accommodate conservation needs; a practice making it difficult to resist applications on ecological grounds alone.

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<sup>223</sup> Letter from Ms S.F. Collins of English Nature; Peterborough, 30.11.93.

<sup>224</sup> For a discussion of the inferiority of created habitats see P. Hopkinson & J. Bowers, 'Sustainability, Roads and Nature Conservation'; ECOS 13(4) 1992 11 @ p.13.

<sup>225</sup> Interview with Mr R. Williams of English Nature; Peak District & Derbyshire Team; 21.2.97.

Planning authorities' willingness to consider fresh applications in conjunction with extant permission on separate sites is also potentially damaging to habitats. Such was the approach of the Peak Park Planning Board over Hartshead and Ivonbrook quarries. Consent to extract mineral from Hartshead had been granted by Interim Development Order in 1946; in keeping with the poor environmental awareness of that period, few environmental conditions were made and very little stipulated about restoration. Several extensions of consent followed, although eventually the site became dormant and remained so for many years.

By 1994 the quarry was under new ownership, and discussions were proceeding with the Planning Board over alternative schemes at neighbouring quarries. The developer was prepared to relinquish the extant consent at Hartshead providing an extension was granted into Ivonbrook quarry; he thus sought to have the sites considered concurrently. It was generally agreed that Ivonbrook was grassland of little ecological value; the board's ecologist acknowledging that the interest present was insufficient to justify an objection. The NCC commented on the site's proximity to the Via Gellia SSSI but did not consider the development likely to effect it; no objections were made. Hartshead, in contrast, had significant ecological value; albeit of a temporal nature due to its dependence upon old quarry workings.

The proposals generated much interest; mainly on grounds of landscape and amenity from walking groups. The CPRE argued that permission ought to be refused; that individual applications should be considered on their own merits and the essential issues should not be obscured by association with other sites -- Hartshead should not be a factor in the decision over Ivonbrook. It is submitted that this is the correct approach; revocation of potentially harmful consent would prevent developers using it as a threat.

However, the Planning Board considered Hartshead and Ivonbrook together. Its Director referred to the limited ecological value of much of Ivonbrook and emphasised what he referred to as a potential 'net wildlife benefit'; i.e. the site would eventually be restored to new habitat including a lake, scrub and limestone grassland. When considered in conjunction with the Hartshead



proposal, this amounted to a substantial environmental benefit. Accordingly, in December 1996 consent was granted with conditions providing for progressive reclamation of the site and conservation management; including translocation and habitat recreation. The agreement concluding the above measures, made under s.106 TCPA 1990, duly provided for revocation of the Hartshead consent under s.99 TCPA 1990.

The case demonstrates the ease with which a developer, who has acquired a site with consent, may use this as a bargaining tool to secure permission for another site. The financial implications of revoking planning permission assist such a developer; whose case is further strengthened where the original consent contains few environmental concessions. A planning authority, with finite resources, is pressurised to accept the least objectionable alternative, and grant the consent sought where environmental harm can be mitigated. Such an enforced choice between the lesser of two environmental evils betrays a low priority for conservation issues generally.

Landscape, not wildlife, suffered most from this decision; the ecological interest ultimately benefited from expert advice and the developer's co-operation. However, it is clear that had habitat been gravely threatened by this development the decision would have been no different. The national park authority, whose decisions reveal a propensity to protect landscape, was unable in this case to avoid its degradation. In any event it cannot be denied that the overall ecological position will be less favourable than would have been the case had Hartshead's consent been revoked and both sites managed in the interest of wildlife.

Mitigation and compensation measures, instrumental to the Hartshead and Ivonbrook outcome, were indeed important generally in the cases researched. Planning authorities take these very seriously because they provide a potential means of developing a habitat whilst retaining an element of conservationist virtue. Their principal concern in the cases studied was that mitigation should feature in the decision; not that it should necessarily be very effective. Certainly there was little sign of critical, in depth examination of such measures. Furthermore, authorities tended to be influenced more by the fact that mitigation was on offer than by the ecological interest at stake. The fact a habitat was

irreplaceable was not a consideration that deterred the use of questionable or untested measures.

This is linked to another general observation -- authorities seldom even contemplated declining a proposal on ecological grounds. The Peak Park Planning Board did so occasionally on landscape grounds; although it always consented ultimately. The role of economic considerations in planning outcomes was conspicuous across all decisions. Employment benefits were extremely influential, and were rightly accorded much attention by the authorities.

Such findings betray the prevailing ideologies within planning. As McAuslan<sup>226</sup> says, the administration of development control is a story of triumph of the ideology of private property over that of public interest. Many guidelines in the public interest will be inconsistent with the important consideration not to impede with planning conditions the commercial success and judgement of the developer. As Shankland<sup>227</sup> claims, the planning system is indeed a capable channel for investment and an effective instrument for change. As the development excesses of the 1980s demonstrated however, this is not necessarily consistent with conservation. Indeed, it may not be compatible with the neutral and consistent reconciliation of competing claims for land use -- planning's main task according to Foley.<sup>228</sup>

Consultation is an important part of planning; a requirement that brings expertise and diverse viewpoints to the decision-making process, and allows interested parties to partake. However, there is evidence that consultation is not treated with the gravity it deserves; both by planning authorities and the courts.

An example of the impunity with which an authority may disregard this requirement, even where a legitimate expectation exists, is the case of *R v Swale BC ex. p, RSPB*.<sup>229</sup> Litigation centred on correspondence between the planning authority, Swale, and the RSPB; over proposed development. Dr Clark requested consultation on behalf of the RSPB at the earliest opportunity; Swale's Mr

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<sup>226</sup> P. McAuslan, *op. cit.* p.147.

<sup>227</sup> See G. Shankland, 'Planners Promoting Investment?'; *The Planner*, 1981, vol. 67, No. 4 pp.90-92.

<sup>228</sup> D.L. Foley, 'British Town Planning: One Ideology or Three?'; *British Journal of Sociology*, 1960, vol. 2 p.11.

<sup>229</sup> [1991] JPL 39; an early stage in the 'Lappel Bank' litigation, see below pp.97-109.

Harman promised to keep him informed. When Dr Clark persisted in requesting consultation in the event of a planning application being received, Mr Harman assured him of consultation in this event. However, when a planning application was received, Swale duly neglected to consult. The High Court declined to grant judicial review; citing undue delay on the part of the RSPB in bringing the action. Brown J's sympathies lay with Swale, which apparently deserved the courtesy of a warning of litigation from the organisation it had wronged. His attitude betrays a lack of judicial respect for conservation *per se*; and illustrates its subservience to planners' discretion within a property-orientated environment. Indeed, the judgment also referred to the substantial financial loss that would have been suffered by third parties if the consent had been quashed. Relevant also was the nature of the relief sought and what it could achieve; i.e. at best a re-determination of the planning permission. Brown J's reluctance to interfere with the lawful conduct of third parties acting in good faith is cited as justification to deny an enforceable right of consultation; and indeed to deny relief to a party that has suffered. Yet to have found for the RSPB would not have precluded a right of action to the third parties. Such an outcome would indeed have ensured that liability lay with the blameworthy party. Judicial support for consultation would also have delivered a clear message to the planning authorities that this is an important aspect of planning; not something to be taken lightly. The court's refusal to do so on grounds of financial loss to third parties and alleged delay merely betrays judicial empathy with economic and property priorities.

Like consultation, the Public Local Inquiry is an important aspect of planning; it is a valuable means of ensuring those without a tangible interest in a planning application can participate.

Newbury Bypass, a proposed dual carriageway avoiding Newbury but crossing important habitats, is synonymous with controversy and confrontation. Alternative routes were initially examined at a Public Inquiry in 1988; consent being granted in 1990 after consideration of an ecological appraisal report.<sup>230</sup> The thoroughness of this report, and thus its reliability, was seriously questioned by the discovery in February 1996 of the rare Desmoulin's Whorl Snail. This

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This did not amount to full EIA.

vindicated earlier claims<sup>231</sup> that the decision at the Public Inquiry was taken on the basis of weak data. Notwithstanding this, construction of the bypass resumed after mass-eviction of protesters in April 1996. Such reliance on incomplete information, and failure to reconsider when this became apparent, is disturbing. Newbury almost certainly will not be an exception. In cases where full EIA is not compulsory -- and these represent the majority of cases involving habitats -- the risk of ill-informed decisions is far from negligible.

Oxleas Wood, an ancient woodland SSSI and LNR in south east London, was threatened by a road development. Before it was reprieved by a change of policy, two Public Inquiries were held. The first recommended a 'cut and cover' tunnel to minimise environmental impact; this was rejected by the government. The second Inquiry proved to be a parody of the first; its terms of reference being rigidly set to exclude any realistic appraisal of environmental impact.<sup>232</sup> Indeed Oxleas Wood inspired descriptions of the planning system supporting Public Inquiries as inequitable, and the Department of the Environment as judge and jury in its own closed court.<sup>233</sup>

A further criticism of the Public Inquiry forum is that, far from facilitating a balanced appraisal of the facts, it is open to domination by those with access to greater resources. This was a factor of the Public Inquiry into the construction of a second run-way at Manchester Airport; development which threatened, *inter alia*, 4ha. of ancient woodland, 4km of high value hedgerow and seventeen ponds containing great crested newts.<sup>234</sup> The evidence submitted by objectors, although costing several hundred thousand pounds, was outweighed by counter-claims backed by the Airport Consultants' budget of millions; including assurances that translocation and habitat creation measures would ultimately result in a significantly improved overall ecological position. The Public Inquiry does not address the inherent resource in-balance between conservationists and developers, and its decisions must be judged in this light. Furthermore, conservation issues do

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<sup>231</sup> Berkshire, Buckinghamshire and Oxfordshire Naturalists Trust Limited; 'Position Statement A34 Newbury Bypass', 30.9.94.

<sup>232</sup> See D. Black, 'Oxleas Wood: A Common Inheritance'; ECOS 12(4) 1991 35 @ p.37.

<sup>233</sup> *Ibid*, p.37.

<sup>234</sup> 'Manchester Airport Second Run-way'; Environmental Statement, Non-Technical Summary.

not always coincide with the parameters of a formal Planning Inquiry -- a source of frustration to the Cheshire Wildlife Trust in the instant case. As Weldon<sup>235</sup> says '...in conducting themselves according to the rules of Inquiry rhetoric, the Wildlife Trust was unable to discuss how its interpretation of conservation values differed from those adhered to by the 'technological fix' mentality of the developer'.

### Planning Policy Guidance

The accommodation of conservation by the planning process is a product of the policy followed by planning authorities at any one time. This is moulded by central government guidance; PPG9 covering nature conservation.

In purporting to reconcile conservation and development, an aim that it regards as achievable,<sup>236</sup> PPG9 nevertheless favours economic interests over the former. Only in respect of European sites does the balance shift towards nature conservation -- and even here the possibility of development is not ruled out.<sup>237</sup> Para.27, whilst conceding that nature conservation can be a significant material consideration in planning decisions, exhorts authorities to avoid refusing consent on ecological grounds by the use of mitigating conditions. It also reminds them that other material factors may be sufficient to override nature conservation. Such encouragement to look to conditions<sup>238</sup> explains the eagerness with which authorities adopt even doubtful mitigation measures like translocation. Warren and Murray<sup>239</sup> rightly criticise para.27 for the implication that nature conservation need not be a material factor -- even in relation to SSSI. This attitude reflects the prevailing ideology of the 1980s and 1990s, whereby economic factors were accorded almost unqualified precedence.<sup>240</sup> However, as Southgate<sup>241</sup> says, the

<sup>235</sup> S. Weldon, 'Judging by experts: news from Manchester airport'; ECOS 18(1) 1997 20, @ p.24.

<sup>236</sup> See p.48 above.

<sup>237</sup> L. Warren and V. Murray, 'PPG9 Nature Conservation - A New Initiative?'; [1995] JPL, 574 @ p.577.

<sup>238</sup> This is also a feature of advice on recreational development consent affecting SSSI; see para.34.

<sup>239</sup> Op. cit @ p.576.

<sup>240</sup> See p.25 above.

<sup>241</sup> M. Southgate, 'Nature Conservation and Planning: Implications of recent guidance and the Habitats Directive for planners'; Sandy: RSPB Report, June 1995, p.4.

considerable emphasis upon economic growth within the guidance is not refined by an explanation of how this should relate to nature conservation policy commitments.

Indeed, one of the principal criticisms of PPG9 is its lack of detailed advice on implementing policy. Guidance is largely descriptive, being little more than a useful source of information on relevant legislation.<sup>242</sup> Although it emphasises the need for developers to be given clear criteria for estimating the likely weight to be accorded to conservation, very little assistance is provided for planning authorities to draw up such criteria. Thus, para.18, which stipulates that the designation of LNRs must be justified by substantive nature conservation value, contains no advice as to the meaning of the word 'substantive'.<sup>243</sup> PPG9 therefore endows planning authorities with substantial discretion in implementing conservation policy. This was confirmed by the Secretary of State for the Environment, Mr Gummer,<sup>244</sup> who said that the general approach is not to interfere with local planning authorities' jurisdiction unless necessary. Generally, applications will only be called-in where they raise planning issues of more than local importance; each case must be considered on its individual merits. Whilst such an approach gives planning authorities the flexibility required to implement appropriate guidelines, it also facilitates consideration of in-apposite factors and allows the basis of decisions to be obscured; characteristics of some of the cases examined.

The guidance contains no reference to the fact that habitats are potentially irreplaceable; an omission mirrored in the registers of local planning authorities. Indeed, para.3 reveals the rationale behind official nature conservation policy: to ensure that attractive environments are available to enhance the nation's social and economic well-being. Such emphasis upon amenity, where landscape and wildlife are maintained principally in order to generate economic returns, is not necessarily conducive to preserving the current range of habitats at a sustainable level. It is unfortunate that a genuine conservationist approach such as that found

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<sup>242</sup> L. Warren and V. Murray, *op. cit.* @ p.577.

<sup>243</sup> *Ibid.* @ p.578.

<sup>244</sup> January 26 1995, H.C. Debs, Vol. 253 Col. 314-315.

in the old PPG7<sup>245</sup> -- which contained a presumption against the development of agricultural land due to its being *irreplaceable* -- was not adopted.

The negative aspects of hierarchical treatment of habitats have already been outlined.<sup>246</sup> This system is reinforced by PPG9; para.18 in particular urging authorities to have regard to the relative significance of designations in considering the weight to be attached to nature conservation interests. The guidance places enormous emphasis upon European sites; and was indeed delayed to ensure it contained advice on the implementation of the Habitats Directive. Disproportionate focus upon European sites relative to other designations and conservation in general risks leaving other habitats in a worse position per development threats than was the case pre-PPG9.<sup>247</sup>

Conservation should be considered within the wider context of the myriad non-economic factors that influence planning decisions. However, PPG9 is specialist guidance concentrating almost exclusively upon nature conservation. Failure to refer to related aspects like landscape and amenity, which often raise identical issues and lead to the adoption of positions diametrically opposed to proposed developments, potentially weakens its efficacy. Such a narrow approach is also a feature of PPG1, which is concerned with general planning policy. Whilst it recognises the role of planning in regulating development via a sustainable framework, including the need to conserve natural resources,<sup>248</sup> there is little direct attention paid to wildlife habitat needs. However, this piecemeal approach to planning policy has not manifested itself in the cases studied as a constraint upon the authorities. Guidance shortfalls were generally overcome, not least in decisions of the Peak Park Planning Board, by a pragmatic 'common-sense' approach.

PPG9 contains several anomalies: para.29 refers to subjecting proposals likely to affect SSSI to 'special scrutiny'; yet mineral extraction proposals affecting such sites must be, per para.40, subject to 'the most rigorous

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<sup>245</sup> See P. Hopkinson and J. Bowers, 'Sustainability, Roads and Nature Conservation'; ECOS 13(4) 1992 11.

<sup>246</sup> See pp.64-65 above.

<sup>247</sup> L. Warren and V. Murray, op. cit @ p.578.

<sup>248</sup> Para.5 PPG1 'General Policy and Principles'; February 1997 -- London: HMSO.

examination'. The latter test is, as Southgate<sup>249</sup> claims, more onerous. This distinction cannot be justified; mineral extraction is usually followed by satisfactory reinstatement, and in any event may often lead to the emergence of a new ecological interest. Other forms of development, particularly road and residential construction, almost invariably result in permanent and irretrievable habitat loss.

Finally, PPG9's preoccupation with European sites invites an interpretation of Annex C1 -- which provides for extant consent to be taken into account when designating SPAs and SACs -- as further proof of habitat protection law's subservience to economic interests.

### **Environmental Impact Assessment**

Whilst perhaps inviting charges of 'instrumentalism',<sup>250</sup> EIA has become an increasingly important aspect of the planning process in recent years. Initiated by the EC,<sup>251</sup> it has been implemented in the UK by a large number of regulations -- thus compounding the general complexity of habitat protection law.<sup>252</sup> As Bichard and Davies<sup>253</sup> suggest, EIA would operate more smoothly if procedures were based on one pre-existing planning statute or operated within an entirely integrated system.

The assessment of environmental impact is a crucial aspect of responsible planning. Formal requirement of a specific ES focuses the minds of planners and developers on this issue and generally raises the environment's profile -- something that, after years of habitat degradation, is long overdue. It ensures that environmental concerns generated by a proposal must be at least addressed. Since the introduction of EIA, it is apparent that the quality of ESs has been improving

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<sup>249</sup> M. Southgate, *op. cit.* @ p.3.

<sup>250</sup> i.e. The folly of addressing environment issues by a single instrument of environmental evaluation; see N. Gligo, 'Sustainabilism and Twelve other 'Isms' that Threaten the Environment' @ p.64, in: *A Sustainable World Defining and Measuring Sustainable Development*; ed. T.Trzyna, Sacramento: International Center for the Environment and Public Policy, 1995.

<sup>251</sup> EC Directive 85/337, O. J. L2/175/40.

<sup>252</sup> See p.64 above.

<sup>253</sup> E. Bichard and P. Davies, *op. cit.* @ p.706.



as more experience of the process has been gained.<sup>254</sup> This is an observation supported by the RSPB in a recent study<sup>255</sup> of thirty-seven EIAs within the context of wildlife habitats. It found that EIA was generally influential as to whether a project proceeded, and to the extent of any modifications and mitigating measures incorporated into the consent. This finding is to be welcomed, as it is important that the results of EIA are taken seriously and genuinely influence decisions. However, the fact that this is so emphasises how vital it is to ensure that assessments are undertaken objectively, competently and on the basis of accurate data.

Notwithstanding the good intentions with which EIA was conceived, its potential benefits are inhibited in practice by operational constraints of the planning process. The time-scale of the assessment itself is determined by financial resources and planning application timing; with the result that EIA expertise often arrives too late to make an adequate contribution to the project.<sup>256</sup>

A fundamental weakness of EIA is its inherent lack of independence. With no obligation upon planning authorities to commission independent assessments, an ES accompanying development proposals is, in reality, part of the developer's case. It is therefore extremely unlikely to conclude that potential impact justifies refusal of consent. Although it may be, as Jones and Wood<sup>257</sup> suggest, unrealistic that an ES should be prepared independently, the relationship between EIA and the furtherance of the developer's cause is not always acknowledged by the decision-makers. Indeed, as Manchester airport demonstrates,<sup>258</sup> the submission of an ES as part of a multi-million pound budget is more likely to precipitate congratulations for thoroughness than caution over potential partiality. We must remember who is responsible for submitting the ES; it is analogous to an expert medical report submitted by the plaintiff in a personal injury action; it should be viewed as such by planning authorities and inspectors.

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<sup>254</sup> C. Jones & C. Wood, 'The Impact of Environmental Assessment on Public Inquiry Decisions'; [1995] JPL 890 @ p.891.

<sup>255</sup> RSPB (1995) Wildlife impact - the treatment of nature conservation in environmental assessment, Sandy: The RSPB.

<sup>256</sup> R. Therivel, E. Wilson, S. Thompson, D. Heaney & D. Pritchard; Strategic Environmental Assessment, London: Earthscan Publications Ltd., 1992, p.21.

<sup>257</sup> Op. cit @ p.903.

<sup>258</sup> S. Weldon, op. cit @ p.23; per inspector's comments.

Practical repercussions flow from the relationship between EIA and the promotion of development. The RSPB<sup>259</sup> found evidence of partiality in its survey. Nature conservation featured in almost all assessments, but predictions were often heavily biased in favour of possible beneficial consequences -- even where negative impacts were likely to be very significant. Indeed, only a minority offered unbiased advice. The lack of independence also influences levels of detail and general input to EIA; as Therivel et al.<sup>260</sup> say, there is little that developers can gain by going beyond the minimum statutory requirements. Thus, although obtaining and taking account of local people's views would increase the effectiveness of an assessment, such action would be unlikely to find favour with proponents due to the time and cost involved; there would also be concern at making potentially commercially confidential information available to public scrutiny.

The lack of inducement for developers to enter into the spirit of EIA also extends to post-assessment activity. The EIA process is essentially a tool with which developers convince planning authorities that any harmful environmental effects that cannot be denied will be adequately dealt with. Developers have nothing to gain by monitoring the situation after development is complete; accordingly it is rare that EIA predictions are tested against eventual implications.<sup>261</sup> Indeed, the necessary techniques to monitor and audit environmental impacts are not yet fully developed. Such criticisms are supported by the RSPB's study,<sup>262</sup> which concluded that post-project monitoring was the most inadequately addressed aspect of the EIA process. Very little real commitment was shown, with monitoring referred to in only 38% of the ESs examined; and then in a vague or incomplete manner. Yet this process is vital to a full evaluation of EIA quality. A requirement to remain involved after the project is completed would also encourage a more responsible attitude to the assessment itself and indeed any mitigation measures proposed.

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<sup>259</sup> Op. cit, paras. 4.14 & 6.5.

<sup>260</sup> Op. cit @ p.17.

<sup>261</sup> Ibid, p.17.

<sup>262</sup> Op. cit @ paras.7.10-7.12.

Reliance on irrelevant factors, as highlighted by the RSPB,<sup>263</sup> is a weakness of EIA. Where public objection to a proposal is anticipated, a proponent will often present an environmentally worse scenario as the natural consequence of his application being refused. This is clearly an abuse of the assessment process. However, there is no doubt that anticipated objections are taken very seriously by proponents, and it is inevitable that this will influence their actions. Indeed, Richard and Davies<sup>264</sup> refer to the direct link between the level of detail required by EIA and the level of perceived risk expressed by third party locals and objectors.

There are criticisms of the quality of information generally relied on within EIA. It is apparent that poor quality data within the process is undermining the quality of planning decisions based upon it. This '...frequently creates situations that allow skilful manipulation of the [assessment] rather than promote its use as a tool for incorporating the environmental dimension into decision-making'.<sup>265</sup> It is a grave weakness, as the quality of information behind EIA determines how well informed the decision-makers are; and is thus crucial to the ultimate choices made and the applicability of the precautionary principle.<sup>266</sup> The RSPB found that where specialist data was referred to, it was often done so primarily to impress non-scientific consultees, decision-makers and the public.<sup>267</sup> Without further elucidation, such information is meaningless to non-experts and as such contributes nothing to the assessment process. Indeed, there is an inherent risk within EIA, particularly in the nature conservation ambit, that specialist subject matter may obscure the real choices facing planning authorities. Similarly, the use of experts in EIA may give the impression that assessment is conducted in '...a remote domain of expertise'.<sup>268</sup>

Mitigation measures are also problematic. Whilst all ESs will address this issue, it is not uncommon in practice for this to happen only after the major decisions have been taken. 'It is even questionable whether in practice mitigation

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<sup>263</sup> (1995) Wildlife impact; para.4.28.

<sup>264</sup> Op. cit @ p.707.

<sup>265</sup> N. Gligo; op. cit @ p.65.

<sup>266</sup> This holds that it is unwise to proceed with development where the potential damage to the environment is uncertain.

<sup>267</sup> Op. cit @ para.6.9.

<sup>268</sup> S. Weldon, op. cit @ p.20.

measures are used to counter the most negative impacts of a project, or whether they are simply used for those impacts that can be most easily ameliorated' ...<sup>269</sup>

A fundamental shortfall of EIA, in its present project-based form, is its difficulty in addressing cumulative impacts of a project. These include: 'additive impacts' of proposals not requiring EIA, such as agricultural activity; 'synergistic impacts' whereby several projects' total impact exceeds the sum of their individual impacts; 'threshold or saturation impacts', concerned with the stage at which the environment becomes dangerously degraded; 'induced or indirect impacts' where one development serves to stimulate further secondary projects; and 'time crowded impacts' where the environment has insufficient time to recover from one impact before it is subject to another.<sup>270</sup> The inter-dependence of fragile ecosystems and potentially far-reaching effects of many developments ensure that the inability to assess cumulative impacts is a very serious weakness of the planning process in this field. The failure is essentially due to a lack of knowledge of other development proposals, and ultimately a lack of control over them;<sup>271</sup> it is hoped that recent acknowledgement<sup>272</sup> of this will eventually lead to improvement.

It is important to remember that EIA is merely one element of the planning process. Even if undertaken competently, it cannot guarantee that all environmental impacts will be minimised. Other material considerations, including economic and employment factors, justify decisions that embrace even serious environmental degradation.<sup>273</sup> Ultimately, the decision to proceed with a proposal is based on a wide range of socio-political and economic issues, as well as environmental ones. EIA findings, however accurate and important, may be overridden in the national interest. Indeed, the RSPB<sup>274</sup> concluded that in most cases surveyed, ecological considerations carried very little weight -- even where the target sites were of considerable ecological importance; engineering, economic and occasionally political factors generally prevailed.

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<sup>269</sup> Therivel et al; op. cit @ p.21.

<sup>270</sup> Ibid pp. 20-21.

<sup>271</sup> See D. Pritchard, 'Towards sustainability in the planning process: the role of EIA'; ECOS 14(3/4) 1993 10, p.13.

<sup>272</sup> See Annex III(1) EC Directive 97/5011; O. J. L73/5/97.

<sup>273</sup> E. Bichard & P. Davies; op. cit @ p.709.

<sup>274</sup> Op. cit @ para.4.24.

Whilst EIA is undoubtedly a useful tool for reconciling conservation and development, it is important to place both this and indeed nature conservation itself in the wider political perspective. As Pritchard<sup>275</sup> says, much habitat protection occurs in an overlap between two legal regimes -- the SSSI system is based on science; but the actual protection of such sites is a political issue. This field's political dimension should not be underestimated.

## **Enforcement and Challenge**

### **1. European Enforcement and Locus Standi**

Environmental law suffers from an inherent enforcement weakness. Whilst legal implementation involving vested interests takes place in public discussion with representatives of those interests present, the environment itself has virtually no vested interest defenders.<sup>276</sup> Furthermore, conservation organisations are generally too weak, both structurally and financially, to effectively defend the environment. Against a backdrop of conflict between diverging vested interests, law enforcement is difficult; the environment, effectively without a voice, is almost bound to lose in this scenario.<sup>277</sup>

It is therefore appropriate that environmental protection has become one of the EU's essential objectives.<sup>278</sup> However, this stance is undermined by inadequate use of the provisions in practice. As Kramer<sup>279</sup> says, it is increasingly recognised that ineffective application of environmental measures is the most serious environmental law shortfall. He refers to four deficiencies in the field of public interest enforcement:

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<sup>275</sup> Op. cit @ p.10.

<sup>276</sup> See L. Kramer, 'Public Interest Litigation in Environmental Matters Before European Courts'; [1996] JEL 1.

<sup>277</sup> Ibid @ p.1.

<sup>278</sup> See C-302/86 Commission v Denmark, ECR 1988 @ 4607.

<sup>279</sup> Op. cit @ pp.3-4.

- Art.169 bestows no discretion upon the European Commission over initiating action -- yet in practice wide discretion *is* exercised; not least where States exercise political influence;<sup>280</sup>
- individuals are powerless to compel the Commission to initiate proceedings under Art.169;
- the Commission's decision to issue a formal notice or reasoned opinion under Art.169 is not published;
- no legal Document summarising details of the complaints' procedure exists.

In understanding this, the part played by the European Commission is crucial. It performs a reactive role within the complaints' process, following the 'top down' approach of Art.169.<sup>281</sup> It is therefore unable to initiate and maintain a self-supporting investigation. As Kramer<sup>282</sup> says, '...the European Commission -- and its services -- are over exposed to administrative, political or other influences in order to be able to exercise fully independently the role as 'guardian of the public interest environment'.

Third party intervention is similarly frustrated. Whilst Art.37 ECJ Statute<sup>283</sup> theoretically facilitates this, the limitations of Art.37(2) effectively exclude it from almost all cases that reach the ECJ.<sup>284</sup> This undermines the potentially valuable role of voluntary conservation organisations. Similarly under Art.173 EC Treaty,<sup>285</sup> litigation in the public interest on the environment suffers from a barrier of 'direct and individual concern'.<sup>286</sup> Environmental groups are generally incapable of clearing such an obstacle. Furthermore, measures to introduce public interest litigation for such groups may initiate pressure to grant the same rights to other representative organisations like trade unions; such 'floodgate' considerations may explain the general absence of an *actio popularis* within the judicial systems of the EU.

<sup>280</sup> See 'Cardiff Bay Barrage' below: pp.90-97; particularly @ pp.92-93.

<sup>281</sup> R. Macrory, 'The Enforcement of Community Environmental Laws: Some Critical Issues' CMLR (29) 1992, 347; pp.363 & 368.

<sup>282</sup> Op. cit @ p.9.

<sup>283</sup> Statute of the Court of Justice; 17.4.57 as amended.

<sup>284</sup> Kramer, op. cit @ pp.15-16.

<sup>285</sup> Which facilitates challenge of a measure adopted by a Community institution.

<sup>286</sup> Kramer, op. cit @ p.16.

Such issues have political and pragmatic dimensions; they influence policy and practice behind domestic and European law. Indeed, political considerations are influential in deterring States themselves from challenging decisions in the wider EU context. For example, in cases such as *Stichting Greenpeace v Commission*,<sup>287</sup> concerning European funding of environmentally harmful projects, challenges are unlikely to succeed as all States benefit from continued funding. This scenario carries a risk of a lacuna developing in law enforcement -- political expedience subsuming the rule of law.<sup>288</sup> To address this, a change in traditional legal thinking within the EU is essential; ultimately, institutional resistance and the tendency to allow economic interests to prevail must be overcome.<sup>289</sup>

Other barriers to enforcement within the environmental context have much more urbane origins. Wils<sup>290</sup> refers to high legal costs in the UK impeding direct effectiveness of Birds Directive provisions. Clearly this also frustrates challenges to planning decisions involving non-European sites; not least because those best placed to intervene are usually voluntary organisations obliged to use their funds prudently. Indeed, action in the domestic courts by such litigants is fraught with difficulty. The general position is that third parties, even if they have actively participated and expressed opinions, have no formal rights.<sup>291</sup> However, they may have a voice where the vires of a decision fall to be questioned; judicial review being the discretionary means of such challenge.

The principal barrier to judicial review is *locus standi*; it is apparent in nature conservation cases that this may be a particularly substantial one. It requires an applicant to demonstrate sufficient interest; a criterion that has been described<sup>292</sup> as a matter of judicial policy. It is therefore difficult to estimate with any certainty whether an organisation will have standing; the broad discretion exercised by the

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<sup>287</sup> T-585/93; [1996] 7 WLAW 98.

<sup>288</sup> See R. Macrory, 'Environmental Citizenship and the law: Repairing the European Road'; [1996] JEL 219 @ p.228; and p.89 below.

<sup>289</sup> N. Gerard, 'Access to Justice on Environmental Matters - a Case of Double Standards?'; [1996] JEL 139 @ p.157.

<sup>290</sup> W. Wils, 'The Birds Directive 15 Years Later: A Survey of the Case Law and a Comparison with the Habitats Directive'; [1994] JEL 219(6) @ p.242, footnote 139.

<sup>291</sup> See J. Upson & D. Hughes, 'Locus Standi an essential hurdle in judicial review of environmental action'; [1994] ELM 136.

<sup>292</sup> *Ibid.*

courts being sufficiently wide to decide the matter in accordance with political expediency.

In *Stichting Greenpeace v Commission*, the applicants were denied standing as they were not affected by the decision in question in a way that differentiated them from others in the vicinity. This outcome, in which Greenpeace's relevant expertise counted for nothing, illustrates the difficulty in understanding the reasoning in judicial review cases. In *R v City of Westminster, ex p. Hilditch*,<sup>293</sup> it was held that a prolonged lapse of time was not necessarily fatal to an application where an unlawful policy was on-going. This can be compared, though not easily reconciled, with the refusal of the court in *R v Swale BC, ex p. RSPB*<sup>294</sup> to grant relief on the grounds of delay -- notwithstanding the action was brought within the requisite three months. *Stichting Greenpeace* suggests that the more people adversely affected by a decision there are, the less chance there is of their being heard, as such litigation would be on too large a scale to satisfy the 'individual concern' requirement.<sup>295</sup> This demonstrates a fundamental problem within environmental law. As Gerard<sup>296</sup> says, emphasis upon individual interests is antithetical to the environment -- a concept that clearly concerns the masses. Yet the courts adhere to the language of Plaumann<sup>297</sup> notwithstanding that the EU now sees itself as environmental guardian, and despite the fact the ECJ may depart from its own case law.

A case in which locus standi was determined strictly was *R v Secretary of State ex p, Rose Theatre Trust Co*,<sup>298</sup> which, although not concerning habitats, is of relevance due to the involvement of a voluntary preservation group. The court declined to regard the applicants as having standing, essentially because it was not prepared to allow a group to claim greater rights than individuals. Whilst the judgment has not subsequently proved influential,<sup>299</sup> it is certainly the case that it remains possible for no individual or group to have the standing to challenge a

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<sup>293</sup> [1990] COD 434

<sup>294</sup> [1991] JPL 39; see above, pp.73-74.

<sup>295</sup> Gerard, *Op. cit.* @ p.152.

<sup>296</sup> *Ibid.* @ pp.152-153.

<sup>297</sup> See *Plaumann & Co. v Commission* (1963) ECR 95.

<sup>298</sup> [1990] 1 QB 504.

<sup>299</sup> See *R v HM Inspectorate of Pollution, ex p. Greenpeace (No. 2)* [1994] 4 All ER 329 @ 351.



contentious decision. As Schiemann<sup>300</sup> says, '...the law regards it as preferable that an illegality should continue than that the person excluded should have access to the courts'. It is submitted that this is not an appropriate way to regulate challenge in the environmental ambit; not least because in practice the environment falls to be represented by voluntary bodies. The existence of such organisations is itself proof that they have a genuine and serious interest in conservation -- they may also possess a range of expertise greater than that of any individual<sup>301</sup> -- all the more important then to allow them access to the courts.

Since the *Rose Theatre* case, there has been some movement away from a strict approach to locus standi.<sup>302</sup> Courts have acknowledged the fact that such plaintiffs, in addition to raising worthy issues, are sometimes well established with a bona fide interest in the case. However, as long as the fundamental issue of standing can be decided 'on the merits of the case' -- simply a means of maintaining the courts' wide discretion -- the enforcement process in environmental law will remain flawed. Indeed, as Upson and Hughes<sup>303</sup> say, although the public nature of environmental law necessitates judicial review as the means of challenge, the increasing complexity of environmental issues renders protection via existing mechanisms untenable. Furthermore, it also intensifies the potential for abuse in the decision-making process. For example, under EIA, Annex II projects require assessment only if significant environmental effects are anticipated; the discretion exercised in determining this issue is not reviewable.<sup>304</sup>

Judicial review, and indeed English law generally, offers much greater protection to material values than to abstract concepts.<sup>305</sup> Whilst Riley<sup>306</sup> maintains that there are factors capable of positively enhancing cultural interests, thus increasing their chances of clearing the locus standi hurdle, these merely serve to illustrate the wide range of potentially influential considerations vis-à-vis

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<sup>300</sup> K. Schiemann; 'Locus Standi'; [1990] PL 342 @ p.342.

<sup>301</sup> See M. Supperstone & J. Gouldie; *Judicial Review*, London: Butterworths, 1992 @ p.339.

<sup>302</sup> See *R v HM Inspectorate of Pollution & MAFF, ex p. Greenpeace* [1993] 5 ELM 183.

<sup>303</sup> 'Locus Standi an essential hurdle in judicial review of environmental action', [1994] ELM 136.

<sup>304</sup> R. Macrory, 'The Enforcement of Community Environmental Laws: Some Critical Issues', CMLR (29) 1992 347 @ p.360.

<sup>305</sup> J. Riley, 'Locus standi and Cultural Interests'; JPL January 1997, 20.

<sup>306</sup> *Ibid* @ pp.22-26.

judicial discretion. One such factor greatly influenced Rose LJ in *Greenpeace* (No.2).<sup>307</sup> He was concerned that a lacuna situation, where a decision becomes unreviewable due to the absence of other challengers, might develop in response to unduly restrictive standing rules. However, this concern clearly did not trouble the judge in the *Rose Theatre* case. The courts thus retain the discretion to impose restrictive interpretations of *locus standi*.

Notwithstanding public law principles governing the exercise of discretion,<sup>308</sup> planning authorities remain legally entitled to make inapt decisions. As Macrory<sup>309</sup> suggests, the time has come to consider whether a decision to allow development in the face of overwhelming evidence of unacceptable impact ought to be actionable. It may be that, after years of habitat degradation and increasing pressure on undeveloped land, the discretion of planning authorities in habitat cases ought to be subject to more stringent administrative regulations.

Where a planning authority fails to properly implement European legislation, the State remains liable. However, although the Secretary of State has a residual power to determine and revoke planning permission,<sup>310</sup> it is not practicable for him to review all local decisions with potential impact upon European law. This represents another enforcement flaw at European level. Provision for direct action by the European Commission against local planning authorities would be consistent with the concept of a Community environmental law framework compatible with Member States' legal and planning systems.<sup>311</sup>

In addition to the above, there are other avenues of habitat protection law enforcement within the planning context. For example, the Attorney General, as guardian of the public interest, has standing to enforce the law on behalf of third parties.<sup>312</sup> However, he has absolute discretion over such proceedings;<sup>313</sup> and as Schiemann says, such action has never been used to challenge a government

<sup>307</sup> [1995] 1 WLR 386 @ 393-5.

<sup>308</sup> See *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

<sup>309</sup> *Op. cit.* @ p.360

<sup>310</sup> Under s.77 and s.100 TCPA 1990 respectively; see above pp.45 & 46.

<sup>311</sup> See R. Macrory; *op. cit.* @ p.357.

<sup>312</sup> See *Stockport District Water Works Co. v Manchester Corporation* (1862) 9 Jur.N.S. 266.

<sup>313</sup> *Gouriet v Union of Post Office Workers* [1978] A.C. 435.

department.<sup>314</sup> This reflects the consensus of stagnation that pervades the enforcement ambit.

## 2. Cardiff Bay Barrage

With a tidal range of fourteen miles and mudflats extending to 169 square km,<sup>315</sup> Cardiff Bay represents one of the most important British sites for the feeding and shelter of waders and wildfowl. It additionally provides a refuge for migratory populations. Situated within the Severn Estuary, the habitat supports a disproportionately high number of birds; representing just 1% of the Severn's intertidal area, it holds 10% of the birds -- including nationally significant populations of dunlin and redshank. However, the estuary itself is ecologically important; with its tidal area designated a SSSI, and over twenty separate SSSI located around its shore.<sup>316</sup> The Severn's international significance was confirmed by designation as a SPA and Ramsar Site on 13 July 1995.

However, Cardiff Bay was excluded from this designation so that construction of the Cardiff Bay Barrage could proceed. Initially proposed in 1986, it aimed to assist the regeneration of the Cardiff area by attracting new investment and raising the potential for future development. A barrage of 1.1km. would hold the rivers Taff and Ely at a permanently high level of 4.5m, creating a 500 acre freshwater bay and new waterfront of 12.8km.<sup>317</sup>

As this would impede free navigation its proponent, CBDC, was obliged to present a Private Bill to Parliament;<sup>318</sup> this was duly deposited in November 1987. Opposition to the project was considerable, encompassing all the major environmental organisations and interested local groups. The resultant delay saw the withdrawal and replacement of the Bill; its replacement including several changes to the mitigation package. This Bill generated over three hundred

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<sup>314</sup> Op. cit @ p.343. Indeed, it is not realistically expected to; see *I.R.C. v National Federation of Self Employed and Small Businesses* [1982] AC 617 @ 644 per Lord Diplock.

<sup>315</sup> CBDC, 'Cardiff Bay Barrage'; Cardiff: 1995.

<sup>316</sup> Cardiff Friends of the Earth; The Cardiff Bay Barrage, Briefing Sheet; Cardiff: August 1996.

<sup>317</sup> CBDC; op. cit, p.1.

<sup>318</sup> See *Priestley v Manchester and Leeds Rly Co* (1840) 4 Y&C Ex 63.

amendments and ultimately succumbed to lack of Parliamentary time. In the 1991-2 session the government, which had long supported Cardiff Bay Barrage, promoted a Hybrid Bill. Upon its principle being affirmed at Second Reading in November 1991, no further petitions on the construction of the Barrage could proceed. Future Parliamentary challenges were thus restricted to matters of detail in the Bill; which duly received Royal Assent on 5 November 1993.

However, hostility to the project remained strong; indeed the NCC had maintained its opposition throughout the Parliamentary stages. There was general dissatisfaction that the Bay had been excluded from SPA designation, and concern that its development in such circumstances directly conflicted with the *Santona Marshes*<sup>319</sup> and *Leybucht Dykes*<sup>320</sup> cases. The government cited overriding economic reasons as justifying exclusion; yet such mitigation is relevant only to the development of a non-priority SPA under Art.6(4) Habitats Directive. It was clear that Cardiff Bay ought to have been classified on the strength of its ornithological interest; any development issues being considered subsequently. There is no doubt that the government's actions were in breach of European law; such allegations at the time having subsequently been shown to have been well founded by the ECJ's decision over *Lappel Bank*.<sup>321</sup>

Additionally, it was feared that the Bill's compensation measures were insufficient to comply with Art.4(2) Ramsar Convention.<sup>322</sup> However, although the Convention is clear that exceptional restriction of a qualifying wetland should, as far as possible, be compensated for by the creation of additional reserves and the protection of an adequate portion of original habitat, it is by no means certain that this requirement is legally binding.

Efforts were made to negotiate a compromise. The RSPB suggested a 'mini-barrage' alternative that mitigated a smaller area of SSSI destruction by new bird feeding areas, and thus sought to reconcile development of the Bay with

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<sup>319</sup> C355/90, [1993] Water Law 209; which established that a State *must* designate a site as a SPA where it fulfils the Birds Directive's ecological criteria.

<sup>320</sup> C57/89 [1991] ECR I-883; which established that reduction of a SPA is justified on very limited grounds, excluding economic or recreational ones.

<sup>321</sup> See below, pp.97-109.

<sup>322</sup> Per Petition of Countryside Council for Wales -- 'Cardiff Bay Barrage -- Against the Bill'; House of Lords Session 1992-93.

conservation.<sup>323</sup> This was rejected by CBDC on the grounds that it failed to secure the quality or quantity of development required to achieve the aims of the Secretary of State.<sup>324</sup> Cardiff Bay Barrage was clearly a project in which the political aims driving it precluded any useful form of compromise from a nature conservation perspective.

With the options of the conservation movement thus limited, formal complaint was inevitable. Appeal was made, on behalf of the RSPB, WWF and FoE, to the ECJ alleging contravention of the Birds Directive. The European Commission agreed to investigate, and two Commissioners duly visited the site to meet objectors and developers on 13 and 14 December 1993. Although a decision was expected during April 1994, this was deferred in March amid suggestions that a Commissioner's letter confirming a breach of EU law had been received and concealed.<sup>325</sup>

It then emerged that on 21 January 1994 a letter from the European Commission had been received by the Secretary of State for the Environment. Its timing, just over one month after the visit, is indicative of the Commission's unease over the project. However, it focused not upon unlawful exclusion from SPA designation but upon the inadequacy of compensation measures proposed. The Commission made several suggestions; including habitat creation to replace lost feeding grounds, preparation of a conservation management plan for the Severn, preparation of a national conservation plan for dunlin and redshank and a firm commitment to complete the classification of the remaining Severn SPA.<sup>326</sup> Assurances were sought that such measures be undertaken before construction commenced.

Thus, when development began on 25 May 1994<sup>327</sup> it seemed that fears<sup>328</sup> of a deal between the Department of the Environment and the European Commission, whereby Cardiff Bay would be destroyed in return for better

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<sup>323</sup> It was not favoured by the planning authority; M. Boyce, South Glamorgan County Council; Documents for HC Select Committee, vol.2, 1990.

<sup>324</sup> CBDC, Planning Update and Economic Appraisal Statement; Cardiff: 15.1.90.

<sup>325</sup> M. Havard; 'Cardiff Bay Barrage: in the balance', ECOS 15(1) 1994, 56 @ p.56.

<sup>326</sup> At this time only 1,357ha. had been classified, out of over 21,000ha. which qualified ecologically; statistics quoted in the Commission's letter.

<sup>327</sup> It continues at the time of writing.

<sup>328</sup> See M. Havard; op. cit @ p.57.

protection of other sites, were realised. The complaint file was indeed closed, and has remained so notwithstanding an appeal by FoE to the EU Secretary General to re-examine the case in view of the lack of correspondence with complainants and failure to disclose documents. As the government has since confirmed,<sup>329</sup> the Commission did not proceed with the complaint because it was satisfied with the former's compensation measures.

Cardiff Bay Barrage is thus an example of a clear breach of European law escaping enforcement action due to European Commission acquiescence. The UK government was able to avoid prosecution merely by promising to undertake measures required by law in any event. This demonstrates a fundamental problem in the operation of European law -- that those charged with its enforcement often have more to gain by negotiation than by coercion. Meaningful implementation of law across a multinational framework like the EU relies on the continuing co-operation of the miscreant; this limits the scope of punitive measures. In any event, mediation is always the easier option.

However, we must not forget that compromise equates with habitat degradation. Continued losses of even small areas of habitat are extremely damaging in total; indeed it was the accumulation of small losses and the enormous destruction of habitat this represented that led to the adoption of the Birds Directive.<sup>330</sup> Habitat protection is undermined by political expedience prevailing over the rule of law -- epitomised by the response of the European Commission to Cardiff Bay's destruction.

The case before the Commission turned on the compensation measures adopted; these also provide cause for concern. CBDC proposed a self-contained wildfowl lagoon with wildlife reserve island. Separate management of the island ecosystem (to protect it from serious pollution incidents) and the unfeasibility of mudflat creation by breakwater or vegetation transfer ensured this represented the only viable mitigation option within the Bay.<sup>331</sup> However, because it replaces tidal mudflat with recreational freshwater, it singularly fails as a compensatory

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<sup>329</sup> Mr Clappison on behalf of the Secretary of State; HC Debs. 17 March 1997; Written Answers, Col.457.

<sup>330</sup> Comments of the Advocate General (AG); Opinion, para.93, C-44/95 (Lappel Bank); see below pp.105-106.

<sup>331</sup> ES, Cardiff Bay Barrage Bill; October 1991.

measure. Furthermore, as the ES<sup>332</sup> concedes, the lagoon will replace only 25%-33% of the high level mudflats and none of the low level mudflats lost. It will furnish just 15% of redshank and 33% of dunlin feeding grounds lost; predictions of other species accommodated are impossible. This fundamental inability of the central compensation measure to adequately compensate is implicit in CBDC's emphasis<sup>333</sup> upon the opportunity to maximise wildlife within the *new environment* the lagoon represented.

Two new reserves at Goldcliff and Uskmouth in the Gwent Levels, twelve miles from Cardiff Bay, were the means by which the UK government avoided prosecution. The initial site favoured for this was Redwick, but its owners were reluctant to sell. Notwithstanding the international significance of the habitat lost and the crucial importance of compensation to the Commission's decision to close the complaint, the Welsh Secretary John Redwood declined to use his compulsory purchase powers. Accordingly, the reserves at Goldcliff and Uskmouth fell considerably short of adequate compensation; replacing tidal mudflat with wet grassland.<sup>334</sup> Contrary to Welsh Secretary William Hague's claim that they represent a substantial compensatory measure,<sup>335</sup> it is anticipated that five thousand birds will be lost as a result of the project.<sup>336</sup> Whilst nothing can compensate for the loss of a habitat such as Cardiff Bay, it is clear that the freshwater lagoon (accepted by the House of Lords Select Committee); and the new Gwent reserves (accepted by the European Commission), fall substantially short of reasonable compensation. The weakness of the measures with which the UK government was able to appease the Commission highlights an inherent flaw in European conservation law enforcement.

EIA, compulsory under Parliamentary rules in respect of the Cardiff Bay Barrage Hybrid Bill, reflected many of the shortfalls later addressed by the RSPB in their comprehensive study.<sup>337</sup> The Non-technical Summary<sup>338</sup> commences with

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<sup>332</sup> ES, Cardiff Bay Barrage Bill; @ para.D1.3.

<sup>333</sup> See CBDC; 'Environmental Strategy for the Bay'; Cardiff: June 1990 @ para.5.1.

<sup>334</sup> P. Linford; 'For Bay Birds', South Wales Echo, 13.12.95.

<sup>335</sup> An oral statement reported in the South Wales Echo; P. Linford, 'Fears for wading birds as new mudflat plan is revealed', 18.1.96.

<sup>336</sup> Ibid.

<sup>337</sup> See above; pp.80-83.

<sup>338</sup> ES -- Non-Technical Summary; Cardiff Bay Barrage, October 1991; see paras.2.2 & 2.3.

a reference to the Bay's unattractiveness and pollution; descriptions of the ecological interest then follow in a tone implying this is present despite the former. There is much focus upon current leisure pursuits within the Bay, and ornithological references are restricted to this context. The EIA essentially draws attention to the perceived benefits of the Barrage and minimises references to negative ecological impacts. The SSSI loss, uncertain impact upon neighbouring bird populations and inherent limited effectiveness of mitigation measures is acknowledged; but only very briefly. In contrast, much emphasis is placed upon promoting other environmental issues; particularly those that are currently en vogue. (For example, proposals for post-development monitoring of water quality to guard against pollution, and claims that the barrage will help protect Cardiff from rising sea levels caused by global warming.)

Ecological impacts that are addressed by the Non-technical Summary are essentially limited to ornithology. References to other species affected, such as *stratiomys furcata* (a red data book fly) and *zannichellia* (a nationally scarce plant) are found only in the full ES. The bias towards birds and minimal treatment of other organisms is difficult to reconcile with the ideal of EIA.<sup>339</sup> Of course, the site is of ornithological importance, as the controversy over SPA designation testifies, but it is additionally a SSSI supporting a range of rare fauna and flora. Maybe the controversy itself served to narrowly focus the minds of those involved upon ornithological impacts. This is a risk inherent in provisions such as the Birds Directive, which are aimed specifically at a limited range of organisms. It cannot be in the interests of habitat protection for the minds of developers and planning authorities to be arbitrarily focused upon selected species; as the Non-technical Summary in this case served to do. This risks overlooking less fashionable species that equally deserve protection. Both Summary and full ES in respect of important habitats ought to address the impact upon *all* species.

The minimal influence of the NCC upon the Cardiff Bay Barrage reinforces the general criticisms of those agencies made above.<sup>340</sup> During this case these effectively had '...their hands tied'.<sup>341</sup> The NCC often finds itself in the difficult

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<sup>339</sup> A weakness also observed by the RSPB, op. cit; see paras.3.12-3.14.

<sup>340</sup> pp. 59-63.

<sup>341</sup> M. Havard & P. Ferns; op. cit @ p.51.



position of opposing a development, yet being obliged at the same time to provide conservation advice and work with developers towards the best possible outcome.<sup>342</sup> Indeed CBDC,<sup>343</sup> whilst acknowledging the NCC's fundamental opposition to the Barrage, trusted that it would co-operate on the management and design of alternative feeding grounds on a 'without prejudice' basis pending Royal Assent. Such a role undermines the NCC's position, and is clearly inconsistent with the maintenance of clear and influential opposition.

However, the case study demonstrates that a high level of effective opposition may be maintained by voluntary organisations. Havard and Ferns<sup>344</sup> extol the great success of the coalition of environmental and conservation groups in Cardiff Bay Barrage; a tribute to the effectiveness of combined opposition forces. The latter applied considerable weight to conservation arguments; and their greater financial resources facilitated the procurement of expert advice. The opposition significantly delayed the project, during which time alternative arguments were aired; an important role during continuing ineffectiveness of the NCC.

Cardiff Bay Barrage also demonstrates the ease with which planning controls may be circumvented by a government-sponsored Bill. A similar proposal today could be accommodated by s.3 Transport and Works Act 1992, which empowers the Secretary of State to make Statutory Instruments facilitating developments interfering with navigation rights. He is obliged by s.10(2) to take into account any objections received; unless he arranges a Public Local Inquiry under s.11(1). Thus, a government-backed development like the Barrage today would be subject to Public Inquiry, with objectors entitled to appear. However, the ultimate planning decision would remain within the Parliamentary sphere. Is Parliament preferable to the local forum from a nature conservation perspective? The performance of the House of Lords' Select Committee<sup>345</sup> in Cardiff Bay Barrage would suggest not. Notwithstanding the obvious weakness of the compensation measures, it considered these sufficient to mitigate habitat loss to

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<sup>342</sup> M. Havard & P. Ferns; @ p.51.

<sup>343</sup> Op. cit, para.4.2.

<sup>344</sup> Op. cit, p.50.

<sup>345</sup> House of Lords, Special Report from the Select Committee on the Cardiff Bay Barrage Bill; 13.6.89; Book of Documents for Select Committee, Vol.I.

the extent that this no longer outweighed the anticipated economic and social benefits. Its decision is certainly difficult to reconcile with its stated aim of striking a balance between ecological and economic considerations. However, we have seen<sup>346</sup> that local planning authorities are no less enthusiastic about adopting poor compensation measures to excuse ecologically harmful development. Furthermore, projected benefits such as the creation of c.22,000<sup>347</sup> jobs over ten years -- compared to half that number otherwise -- will be equally influential whether the decision is taken by Parliament or a local planning authority.

In any event, it may be argued that cases like Cardiff Bay Barrage ought to be considered centrally, under the call-in provisions of s.77 TCPA 1990, as they raise issues that go beyond local concern. Indeed, centralised decision-making would accord with current nature conservation legislation, which seeks to maintain networks on a national and international scale.

The significance of this case study is the unlawful exclusion and destruction of an important habitat in a climate of ineffectual enforcement. It attests to the weakness of our national site protection legislation, and the disregard shown by governments to the spirit of international law.<sup>348</sup> Unfortunately, barriers to effective law enforcement by the European Commission vis-à-vis Member States ensure that habitat protection often relies upon the good will of those States in acting within the spirit of the law. Environmental issues are generally subservient to economic requirements; and it is the latter that determine the policy of governments. Political will necessarily prevails over law where the latter merely serves to regulate administration and policy decisions; and where political influence distorts the enforcement process.

### 3. Lappel Bank

Having reviewed a case of inadequate European Commission enforcement, it is now prudent to examine a project subject to judicial review and appeal. Lappel Bank also involved a denial of protective status to an internationally important

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<sup>346</sup> Above; p.70.

<sup>347</sup> House of Lords; op. cit @ p.109.

<sup>348</sup> M. Havard & P. Ferns; op. cit @ p.51.

bird habitat; however, the resulting opposition here was channelled into litigation. The case study therefore investigates direct enforcement of Community law before English courts.

Lappel Bank was situated within the intertidal mudflats of the Medway Estuary. Providing 4,681ha. of breeding, wintering and migratory resting grounds for wildfowl and waders, the estuary is an area of international ornithological importance. Indeed, in 1986 it was listed under the Ramsar Convention and became a candidate SPA. Lappel Bank itself, which accounted for 22ha.<sup>349</sup> of the estuary, was included within the proposed SPA in 1991. Although not supporting any 'priority species' under Annex I to the Birds Directive, some species were present in significantly greater numbers than elsewhere in the Medway. The habitat provided good quality feeding and sheltering grounds for curlew, redshank, turnstone, dunlin, ringed plover and shelduck. Furthermore, its significance relative to the overall SPA was apparent from estimates that its destruction would actually lead to a reduction in species populations of the surrounding habitat.<sup>350</sup>

The development threat came from the expanding port of Sheerness; by the late 1980s continued expansion was physically possible only by reclaiming Lappel Bank. The port is of great importance economically, in an area suffering from a serious unemployment problem. Further expansion into the final undeveloped area of Lappel Bank was accordingly sanctioned by Swale Borough Council in August 1989.<sup>351</sup> A subsequent application to develop Lappel Bank as a car and cargo park was called-in by the Secretary of State under s.77 TCPA 1990. The Public Inquiry concluded, in August 1991, that this threatened sufficiently adverse ornithological impacts to involve a breach of the Birds Directive.<sup>352</sup> On the grounds that the conservation interest outweighed economic considerations, the inspector recommended a refusal of consent.<sup>353</sup> However, he also acknowledged

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<sup>349</sup> Per the agreed statement of facts, C-44/95 R v Secretary of State for the Environment, ex p. RSPB [1995] JPL. 842 @ 843.

<sup>350</sup> Ibid.

<sup>351</sup> This consent was subject to unsuccessful challenge over non-consultation: R v Swale Borough Council, ex.p, RSPB [1991] JPL 39; see above pp.73-74.

<sup>352</sup> Per C-44/95; AG Opinion, @ para.6; 21.3.96.

<sup>353</sup> This was accepted by the Secretary of State.

that any decision over the current application was undermined by the partly implemented consent granted in 1989.

By 1993, the government was finalising the boundaries of the proposed Medway and Marshes SPA, amid controversy over whether the 1989 consent ought to be revoked. On 15 December 1993 the Secretary of State, John Gummer, announced classification of the SPA. He explained Lappel Bank's exclusion in the following terms:

I am aware that Lappel Bank is an important component of the Medway estuarine system but it represents less than 1 per cent. of the total area of Medway SPA. I also recognise that further reclamation at Lappel Bank is essential to the continued viability of the Port of Sheerness. The Port is a significant contributor to the economy of the Isle of Sheppey, the South East Region and the UK, several hundred jobs are dependent on its operations...I have concluded that the need not to inhibit the commercial viability of the port, and the contribution that expansion into this area will play outweighs its nature conservation value.<sup>354</sup>

Consent was granted and development duly commenced in June 1994, against a backdrop of intense opposition. The central issue in this conflict was whether the Secretary of State had been entitled to take account of economic requirements when delimitating the SPA; it not being in issue that he had done so. The RSPB contended that classification under the Birds Directive must proceed on ecological grounds only, Art.2 factors such as economic considerations being irrelevant to classification per se. On this basis, it sought judicial review of the Secretary of State's decision, citing *Leybucht Dykes*,<sup>355</sup> *Commission v Italy*<sup>356</sup> and the Advocate General's Opinion in *Commission v Belgium*.<sup>357</sup>

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<sup>354</sup> Per C-44/95; AG Opinion @ para.7; 21.3.96.

<sup>355</sup> C-57/89 [1991] ECR I-883.

<sup>356</sup> C-262/85 [1987] ECR 3073.

<sup>357</sup> C-247/85 [1987] ECR 3029.

The Queen's Bench Division of the Divisional Court refused the application on 8 July 1994, Rose L.J. and Smith J. concluding that economic considerations could be taken into account at classification. The court held that the matter was *acte clair* in the UK government's favour.

An appeal against that decision was dismissed by the Court of Appeal on 18 August 1994. Construction of the Birds Directive, upon which the appeal turned, divided the court. Two Lord Justices of Appeal, Steyn and Hirst L.JJ., refused to countenance that European Law might exclude economic considerations from the decision-making process. They considered the matter to be *acte clair* that the Secretary of State was entitled to have regard to such considerations. The third, Hoffmann L.J., considered it to be *acte clair* the other way. However, the Court did not feel that such discord justified referral of the interpretative point to the ECJ. Hostility to referral is epitomised in the robust judgment of Steyn L.J. He denied that the differences of judicial opinion had anything to do with inarticulate major premises about environmental matters, and considered that the case turned merely on a difference of opinion as to the legal approach to construction.

This refusal to refer notwithstanding fundamental disagreement at a senior judicial level has rightly attracted criticism.<sup>358</sup> The AG<sup>359</sup> later commented that, whilst it was possible to reach a clear and unequivocal answer to the question raised, it was not certain that the correct application of Community law was so obvious as to leave no scope for doubt on the issue. Clearly the Court of Appeal must be free to discharge its appellate functions, and mere discord on the bench does not in itself justify referral to a higher court. However, conflict of opinion here went to the root of the dispute; and there can be no resolution without clarity as to the law. Furthermore, cases on the interpretation of European law embrace jurisprudence that is traditionally alien to the English legal system; prudence dictates that fundamental disagreements must be referred to the ECJ for final determination. Indeed, the importance of this case to both parties increased the likelihood of further appeal; referral direct from the Court of Appeal may have rendered appeal to the House of Lords unnecessary. In any event, it would have

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<sup>358</sup> See R. Buxton; 'Bye Bye Bank Birds', *The Times*, 21 February 1995.

<sup>359</sup> C-44/95; Opinion, @ para. 38, 21.3.96.

reduced the delay in determining the appeal; a not insignificant benefit in the circumstances. Clear identification of issues by national courts and their speedy referral to the ECJ '...is essential for the development of a clear and authoritative European environmental law'.<sup>360</sup> The English legal system is currently frustrating this development.

The Court of Appeal focused upon the technicalities of the Birds Directive, as opposed to the substantive merits of the Secretary of State's decision; and thus remained within the usual parameters of public law.<sup>361</sup> However, the majority of the court attempted to find the underlying purpose of the legislation; an approach that, as Harte<sup>362</sup> claimed, was bound to result in value judgements about what that purpose should be. There is an inherent risk that this will lead to a result that conflicts with the consensus behind the enactment; although where an objective literal reading of legislation is problematic, courts have little alternative to searching for its rationale. In the present case, both the legislation and case law were sufficiently clear to facilitate a literal interpretation. That the majority in the Court of Appeal chose not to do so is an indication of its difficulty in accepting the irrelevancy of economic considerations to SPA designation

This is linked to the peculiarly British characteristic of presuming that development is beneficial per se; a notion that seems to have influenced the Court of Appeal.<sup>363</sup> Such ideology is indeed a major obstacle to protecting habitats from development.

The RSPB appealed to the House of Lords, seeking certiorari to quash the Secretary of State's decision, a declaration as to its unlawfulness because it embraced economic considerations and mandamus requiring its reconsideration. Its case<sup>364</sup> was essentially that Hirst and Steyn L.JJ. had misconstrued the Birds Directive in respect of its practical operation, had misunderstood the leading case of *Santona Marshes*<sup>365</sup> and ignored European jurisprudence in adopting their own

<sup>360</sup> J. Harte; 'Nature Conservation: The Rule of Law in European Community Environmental Protection', [1997] 9 JEL 139 @ p.179.

<sup>361</sup> See J. Harte; 'Nature Conservation: The Framework for Designating Special Protection Areas for Birds', [1995] 7 JEL 245 @ p.268.

<sup>362</sup> Ibid @ p.268.

<sup>363</sup> See J. Harte; 'Nature Conservation: The Rule of Law in European Community Environment Protection', [1997] 9 JEL 139 @ p.173.

<sup>364</sup> Per case papers retained by the RSPB's instructed solicitor.

<sup>365</sup> C-355/90 [1993] Water Law 209.



construction of the Directive. As their analysis relied upon its own interpretation of the Directive, this could not -- even if correct -- be regarded as *acte clair*. Therefore, refusing a reference to the ECJ was unjustified.<sup>366</sup> The RSPB essentially adopted Lord Hoffmann's dissenting judgment; Lappel Bank's inclusion within the SPA could be lawfully departed from only if there were ornithological reasons for doing so.<sup>367</sup>

The UK government argued that, as the Birds Directive did not expressly take account of economic requirements, Member States were free to do so. It relied upon a paragraph of the AG's Opinion<sup>368</sup> in *Leybucht Dykes* that referred to States' choice of designated sites; in particular that economic interests may be taken into account.

Reclamation of Lappel Bank had been proceeding throughout the litigation stages. By 1 June 1995 approximately one third of the disputed area had been resurfaced and was in use by the Port; and it was anticipated that development would be complete within a matter of months.<sup>369</sup> It was therefore likely that the site would be destroyed before a final decision could be obtained. Accordingly, the RSPB sought interim relief in the form of a declaration that the Secretary of State would be acting unlawfully if he failed to prevent the deterioration of Lappel Bank pending final judgment. An injunction to stay the development was not feasible; the 1989 consent could not be challenged<sup>370</sup> and that of 1994 was *prima facie* lawful. Thus, any action over planning permission was restricted to Ministerial intervention. As the RSPB contended, the Secretary of State could have modified the terms of the consent or negotiated a moratorium with the developers. However, it was considered impossible to satisfactorily frame a mandatory injunction against him other than in general terms that he should comply with Arts.6 & 7 Habitats Directive.<sup>371</sup> Dicta of Lord Bridge on interim relief in *R v HM Treasury, ex p. BT*<sup>372</sup> was cited. His Lordship said that the court

<sup>366</sup> The RSPB relied upon the case of *Customs & Excise Commissioners v ApS Samex* [1983] 1 All ER 1042 on this point.

<sup>367</sup> Observations of the RSPB before the ECJ; C-44/95; para.92(b).

<sup>368</sup> Para.28; [1991] ECR I-883.

<sup>369</sup> C-44/95, AG Opinion @ para.9; 21.3.96.

<sup>370</sup> See *R v Swale Borough Council, ex.p. RSPB* [1991] JPL 39 above, pp.73-74.

<sup>371</sup> i.e. to assess projects having a significant environmental effect; the RSPB contending that Lappel Bank ought to be treated as though it were a designated SPA.

<sup>372</sup> [1994] 1 CMLR 621.

should, in the interests of justice, make a prediction of the final outcome and give that prediction decisive weight in resolving the interlocutory issue. The RSPB argued that the ECJ would follow its previous approaches to Birds Directive construction and confirm the irrelevance of economic considerations to SPA classification; interim relief should therefore be granted on the basis of this likely outcome.

The House of Lords acceded to the RSPB's request for referral to the ECJ. As Lord Jauncey of Tullichettle said,<sup>373</sup> competing arguments of substance, and support for each in conflicting Court of Appeal judgments, made referral inevitable. With the agreement of the parties, the following two questions were referred by order of 9 February 1995:<sup>374</sup>

(1) Is a Member State entitled to take account of the considerations mentioned in article 2 of Directive 79/409 of April 2, 1979 on the conservation of wild birds in classification of an area as a Special Protection Area and/or in defining the boundaries of such an area pursuant to article 4(1) and/or 4(2) of that Directive?

(2) If the answer to question 1 is "no", may a Member State nevertheless take account of article 2 considerations in the classification process in so far as:

(a) they amount to a general interest which is superior to the general interest which is represented by the ecological objective of the Directive (i.e. the test which the European Court has laid down in, e.g. *The Commission v. Germany* ("Leybucht Dykes") (Case 57/89) for derogation from the requirements of article 4(4)); or,

(b) they amount to imperative reasons of overriding public interest such as might be taken into account under article 6(4) of Directive 92/43 of May 21, 1992 on the conservation of natural habitats and of wild fauna and flora?<sup>375</sup>

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<sup>373</sup> [1995] JPL 842 @ 845.

<sup>374</sup> Ibid @ pp.845-846.

<sup>375</sup> This issue had been raised for the first time by Hoffmann L.J. in the Court of Appeal.



Their Lordships then turned to the RSPB's application for interim declaratory relief. This was declined on the following grounds:<sup>376</sup>

(1) the Secretary of State cannot know the proper basis upon which to make the assessment required until the ECJ has ruled upon the construction of Art.4;

(2) the objective of the application -- a suspension of further development pending the ECJ ruling -- would be likely to result in very large commercial losses to the Port and possibly the planning authority. Such an application against the developer would have necessitated a cross undertaking in damages -- the applicants here were seeking to achieve the same result without the risk of substantial expenditure;

(3) the proposed order, declaring that the Secretary of State acts unlawfully if he fails to act in a specific way, is not declaratory but mandatory which, if granted, would be in the form of an interim injunction;

(4) in any event the declaration sought would not, per se, achieve the applicant's objectives as the extant consent allows the developers to proceed. Prevention of this would require the utilisation of further machinery; with very considerable financial considerations.

Notwithstanding Lord Jauncey's supplication for an urgent consideration by the ECJ,<sup>377</sup> Lappel Bank was destroyed before a ruling could be obtained. The salient issue in the refusal of interim relief was the anticipated commercial losses if the application had succeeded. Thus, pecuniary considerations were ultimately more influential than the destruction of an internationally important habitat; a symptom of the supremacy of economics within judicial reasoning. Furthermore, the implication that voluntary bodies ought to be regarded as being analogous to

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<sup>376</sup> [1995] JPL 842, pp. 847-848.

<sup>377</sup> Ibid @ 846.

companies or private litigants is unhelpful. As the appellants' solicitor<sup>378</sup> said afterwards, no responsible charity could have given the undertaking required by the Lords. Such a requirement is unreasonable considering the vital role played by charitable organisations in habitat protection; it blunts the law's enforceability.

This aspect of the case also demonstrates a weakness of the rule that restricts English courts to the consideration of matters for which there is a *lis inter partes*. Such inflexibility ensures that the risks attending litigation must be taken in order to test the law in relation to a specific issue. As Harte<sup>379</sup> suggests, the justification for restricting courts to the consideration of disputes before them -- protection from unnecessary litigation and ensuring decisions are taken in context -- is now outmoded in public law.

The ECJ was asked by the RSPB, though not by the House of Lords, to comment upon the refusal of interim relief. It followed the recommendation of the AG<sup>380</sup> and declined to comment. However, Buxton<sup>381</sup> predicts that the legality of requiring an undertaking before granting relief will eventually be reviewed by the ECJ. Interim relief may one day be available notwithstanding, or perhaps because, it is institutionally inappropriate for charitable applicants to provide financial guarantees. Indeed, this area may witness gradual change; with a progressive trend to directly effective EU law eventually leading to greater rights accorded to voluntary conservationist plaintiffs. If environmental protection is increasingly recognised as being capable of outweighing economic factors, the courts may be more willing to delay development, whatever the financial cost, rather than back irreversible loss of heritage.<sup>382</sup>

The issues before the ECJ were orally heard on 7 February 1996; the Opinion of the AG, Mr Fennelly, being delivered on 21 March. He criticised the UK government's analogy between economic factors in derogating from Art.4(4) Birds Directive and in SPA classification. This was based on a misreading of the Leybucht judgment; where the court had clearly stated that a reduction of a SPA

<sup>378</sup> R. Buxton; 'Bye bye, Bank birds', The Times 21.2.95.

<sup>379</sup> 'Nature Conservation: The Framework for Designating Special Protection Areas for Birds' [1995] 7 JEL 245 @ p.277.

<sup>380</sup> Footnote 5, para.10; Opinion; 21.3.96..

<sup>381</sup> 'Bye Bye, Bank birds', The Times, 21.2.95.

<sup>382</sup> See J. Harte, 'Nature Conservation: The Rule of Law in European Community Environment Protection' [1997] 9 JEL 139 @ p.178.

could *not* be justified by economic factors. Only those grounds corresponding to a general interest superior to the general ecological interest are capable of justifying reduction; economic interests do not qualify as such (para.81). Mr Fennelly also rejected a 'common sense' argument relied upon by the UK; this involved the hypothesis of two similar sites, one adjacent to an industrial area and the other remote from such activities, where conservation required the classification of only one. He confirmed that, providing both sites satisfy the criteria for classification, there is nothing to absolve a State from classifying both as SPAs (para.88). The AG answered the first question; whether Arts. 4(1)/(2) should be interpreted as to allow economic requirements to be taken into account at classification and boundary determination; in the negative.

Part (a) of question 2, the relevance of economic requirements amounting to a superior general interest, related to the Leybucht Dykes case. That had recognised that superior general interests were capable of justifying the reduction of an already designated site. It would follow that they are also capable of influencing the classification of SPAs; although compensatory measures would be required. The AG ruled that economic interests could not constitute such a superior general interest (paras.92-94).

Part (b) of question two; whether Art.2 considerations amounting to an overriding public interest, within the meaning of Art.6(4) Habitats Directive, can be taken into account in SPA classification; was also answered in the negative (paras. 95-99). The UK had argued that to exclude such considerations from the classification stage would be inviting unnecessary administration for those sites classified then immediately made subject to derogation. The AG rejected this approach, emphasising the compensation requirements attendant upon derogation that it would deny.

In light of previous case law, it is difficult to contemplate the AG reaching a different conclusion on the matters referred. However, his attitude to the wider issues is also encouraging. He refers, in para.47, to wildlife being part of man's common heritage. This embracement of anthropocentric philosophy,<sup>383</sup> whilst concerned with the protection of common human interests as opposed to the

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Harte, [1997] 9 JEL 139 @ p.178.

natural world per se, is a refreshing departure from the routine individual rights dicta of English judges. Future enactment and enforcement on this basis will encourage the emergence of an effective European environmental code.

The questions referred to the ECJ were formally answered on 11 July 1996 and, although not obliged to do so, the eleven members of the court followed the AG's Opinion. Arts.4(1)/(2) Birds Directive were interpreted as excluding economic considerations from SPA designation. Furthermore, such considerations could not amount to an interest superior to the ecological objective of the Directive; nor could they qualify as imperative reasons of overriding public interest under Art.6(4) Habitats Directive.<sup>384</sup> At the time of writing we await the formality of the House of Lords' decision on the basis of the clarified law.

Several implications flow from this case. In the wake of Lappel Bank's destruction, the RSPB<sup>385</sup> called upon the government to provide habitat compensation. However, the uniqueness of this internationally significant habitat, and the fact that all surrounding land of ecological interest is already under SPA designation, renders genuine compensation impossible. Winter<sup>386</sup> criticises Art.169 EC Treaty for not empowering the court to order removal of the infringement in cases of unlawful exclusion and development. He also suggests that the decision in Santona, where the court stated that construction *and* non-removal of the development in question was unlawful, may point to a right of removal of the Lappel Bank development. However, even if this was so, there would be little to gain in enforcing this right as reclamation has destroyed the habitat as an ecological entity.

Jones<sup>387</sup> refers to the likelihood that the JNCC and NCC will be obliged in future to provide more detailed scientific justification for proposed European sites; particularly those within or adjoining areas of economic development. Furthermore, provisional boundary delineation may preclude a later denial of suitability of the area; bearing in mind the strict rules on classification. If so, it may be tempting to avoid discussion of preliminary boundaries at an early stage,

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<sup>384</sup> pp.847-849, [1996] JPL.

<sup>385</sup> RSPB News, Sandy: 11.7.96.

<sup>386</sup> G. Winter, addendum to J. Harte, op. cit. @ p.179.

<sup>387</sup> W. Jones, Information Sheet No.2, UKELA; Peterborough: August 1996.

focusing protection on as small an area as possible.<sup>388</sup> Certainly it seems likely that the focus of conflict may shift from development to designation as a result of Lappel Bank; the need for voluntary conservation bodies to remain vigilant will continue to be as important as ever.

Indeed, the decision also raises the possibility of such organisations litigating to compel designation of sites that are unlawfully excluded. Planning authorities thus far have usually been able to justify development by avoiding procedural irregularity; Lappel Bank now provides a strict rule that is incapable of being overridden by administrative preference for economic issues over conservation.<sup>389</sup> However, as this research demonstrates, barriers to law enforcement such as locus standi and interim relief, are not inconsiderable.

Whilst Lappel Bank illustrates many of the shortfalls within legal habitat protection, it also clarified the law on European site<sup>390</sup> designation. Economic reasons cannot excuse a failure to classify; although such considerations may be relevant subsequently, where development may proceed on economic grounds. The case is extremely important in the long term, representing a significant step towards a European legal principle that environmental protection '...may amount to an absolute, superior to economic considerations or to the priority normally given to development potential'.<sup>391</sup> In essence the case establishes that where a site is worthy of European status but development is inevitable, it ought to be designated in the first instance and then declassified according to Art.6 Habitats Directive; it thus strikes the correct balance between nature conservation and development. The alternative position, as maintained by the French government<sup>392</sup> in this case, considered that designation followed by immediate development was illogical. It would dilute the scope of SPA classification and encourage States to designate without alluding to imminent development proposals; consideration of the latter thus being postponed. However, if the French arguments had prevailed, there would have been an increased likelihood of sites being classified on their

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<sup>388</sup> J. Harte, 'Nature Conservation: The Framework for Designating Special Protection Areas for Birds', [1995] 7 JEL 245 @ p.270.

<sup>389</sup> J. Harte, 'Nature Conservation: The Rule of Law in European Community Environment Protection', [1997] 9 JEL 139 @ p.172.

<sup>390</sup> It applies to SACs also.

<sup>391</sup> J. Harte; op. cit @ p.169.

<sup>392</sup> Observations of the Government of the French Republic; C-44/95, Paris: 22.6.95.

lack of economic potential, as opposed to their ecological significance. Now that the Habitats Directive provides a clear and simple means of derogating from Birds Directive protection, there is no justification for reluctance to classify a site earmarked for development.<sup>393</sup> The greater administrative burden this approach entails is the acceptable price of habitat protection.

It must not be overlooked that the litigation reaffirming the proper balance between conservation and development ultimately failed to protect the habitat in question. Whilst this is an indictment of the English legal system, the European Commission also served to undermine the enforcement process by inviting the ECJ to treat Lappel Bank's exclusion as partial declassification.<sup>394</sup> This was nothing less than an attempt to condone an unlawful act.

The principal conclusion from Lappel Bank is that English courts fail to give sufficient weight to environmental considerations before them. Judicial preference for economic issues over conservation was compounded by the delay inherent in litigation, and institutional reluctance to refer matters to the ECJ. The English courts thus served to undermine clear and well-balanced habitat protection law.

## Conclusion

The foregoing findings support the critical stance adopted by this paper in evaluating legal and regulatory processes' protection of habitats from harmful development.

There are many laudable features of habitat protection law vis-à-vis the planning process; not least those emanating from the EU. However, planning necessarily seeks compromise; a fact evident in the cases examined. The overriding need for concessions manifested itself in the propensity of planning authorities to readily accept even weak compensation measures. Precedents thus set served to undermine the protective regime. Within an environment sensitive to political influences, nature conservation fell to be considered merely as another potential land use. The prevailing ideology is a propensity to favour economic

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<sup>393</sup> See para.60, Observations of the RSPB before the ECJ; C-44/95.

<sup>394</sup> An invitation declined by the AG; para.62, Opinion, 21.3.96.

considerations, something that inevitably undermines attempts to reconcile conservation and development. Developers, with extensive resources and the benefit of EIA to enhance their case, are at a great advantage over voluntary environmental groups in planning disputes.

Such economic disparity inherently weakens attempts by environmental organisations to enforce the law in this ambit; indeed, weak enforcement is one of the principal conclusions of this research. Problems were encountered in enforcing European provisions; both from the perspective of European Commission involvement and domestic litigation. Cardiff Bay Barrage testifies to the former; and emphasises the inherent difficulty in enforcement against a backdrop of compromise and political influence. Lappel Bank demonstrates how, in response to a similar set of circumstances, litigation proved no more successful; notwithstanding that the eventual outcome favoured the conservationists.

The final part of this paper summarises the critique, and places the research into perspective by examining the wider issues raised. Suggestions are made for reform and indications given as to further appropriate work in this field.

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## **Chapter 5:**

### **SUMMARY & CONCLUSION**

#### **Introduction**

The purpose of this chapter is to distil the research into a concise, readily accessible form. Au fond, it outlines how the narrow field framed by the research question has been enhanced by this work.

Three approaches are adopted: a summary of the critique, proposals for reform and overall conclusion. The former outlines the various strands that make up my line of reasoning in pursuing the research question. In response to criticisms made, proposals for reform are explored; as well as guidance on potential further work which naturally follows on from this research. Finally, it is important to place the study in perspective, both within the planning and environmental fields and the wider social context. This is essential to a full understanding of the subject matter.

#### **Summary**

The object of this thesis is to illustrate the extent to which wildlife habitat protection is accommodated by legal and regulatory processes; the focal point being development threat. The premise under-pinning this examination was that the faith demonstrated in the planning system by nature conservation law cannot be justified.

This was borne out by the research, which concludes that legal and regulatory processes' protection of habitats from harmful development is inadequate; enforcement being a major weakness. The evaluation covered a range of local planning authority decisions, and two detailed case studies that allowed focus upon enforcement.



Historically, official habitat protection and planning emerged contemporaneously and have since maintained a close relationship. Indeed, the planning system's key role in nature conservation is to be expected since the use of land affects habitats in direct, indirect and cumulative ways.<sup>395</sup> However we have also seen, especially during the 1980s and 1990s, that planning is a versatile tool which reflects the prevailing social and political consensus. The dependence of conservation upon planning, and the latter's role as an instrument of *laissez faire* economics during recent years, explains its current failure to adequately protect the nature conservation interest. Of course, there have been valuable developments in this field since its baptism in the 1940s. The vital role played by the NCC and the emergence of European environmental law have been, and will continue to be, of great benefit to the conservation cause. However, habitat protection is frustrated by inherent planning deficiencies and barriers to law enforcement; a state of affairs that, like the under-funding of the NCC, betrays a lack of political support for effective conservation.

The research demonstrated the ultimate failure of the planning system to facilitate sustainable development. This is a fundamental aim of planning policy, and has been defined as development that '...meets the needs of the present without compromising the ability of future generations to meet their own needs'.<sup>396</sup> In terms of wildlife habitats, the key issues for sustainability are species conservation and the implementation of conservation policies throughout all relevant policy sectors.<sup>397</sup> However, the research demonstrated that habitat, and ultimately species, conservation failed to carry sufficient weight in planning considerations. Conservation needs frequently capitulated before economic interests; planning authorities justifying this by the approval of compensation and mitigation measures that were rarely equal to their task. Refusal of consent on conservation grounds was seldom even contemplated. However in any event, as the construction of Cardiff Bay Barrage demonstrated, even an effective and strong planning system may be circumvented in favour of centralised decree.

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<sup>395</sup> S. Owens, *op. cit.* @ pp.20-21.

<sup>396</sup> World Commission on Environment and Development, *Our Common Future*, Oxford: Oxford University Press, 1987 @ p.8.

<sup>397</sup> 'Sustainable Development: The UK Strategy'; Cmnd. 2426, 1994 @ p.94.

EIA, introduced for the laudable reason of ensuring decisions were taken on the basis of the fullest environmental information, is little more than an effective servant of economic interests. Presented as part of the developers' case, its assessment of impact is necessarily consistent with this. Such disputable objectivity is compounded by a general failure to assess the cumulative and indirect effects of projects.

Domestic provisions protecting habitats are complex and overlapping; the myriad designations delivering a hierarchy that has been exploited by developers under largely descriptive planning policy guidance. The research illustrated that such habitats were regarded merely as individual un-related sites by planning authorities, notwithstanding that these were originally intended to form a *network* of sufficient size to conserve the entire range of native wildlife.<sup>398</sup>

Whilst no provision exists in respect of domestically designated habitats for mandatory replacement of destroyed sites, this is the case in respect of sites designated under European law. Furthermore, as settled in *R v. Secretary of State, ex p. RSPB*,<sup>399</sup> classification of such sites does strike an appropriate balance. However, the analysis indicated that enforcement is the Achilles' heel of EU environmental law. In particular, there was reluctance on the part of English appellate courts both to adhere to European law and to refer ambiguous issues to the ECJ for clarification. Also, refusal to stay the destruction of Lappel Bank, pending the outcome of litigation, served to demonstrate the loyalty of English courts to property values; and illustrated the barriers to law enforcement faced by both individuals and voluntary groups. The case of Cardiff Bay Barrage raised issues over enforcement by the European Commission itself. Failure to adequately intervene over a clear breach of the law governing habitat classification, for reasons of political expediency, betrayed a grave weakness of European law enforcement.

The analysis in the substantive sections of the thesis demonstrates shortfalls in enforcement and challenge generally. Thus unremedied-remedied failure to consult, a subjectively framed Public Inquiry system and narrow interpretation of

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<sup>398</sup> Cmnd. 7122, 1947; @ p.17.

<sup>399</sup> [1997] 9 JEL 139.

locus standi all contributed to a sense of frustration in promoting conservation interests in the planning ambit.

It is apparent that habitat protection is accommodated only marginally by legal and regulatory processes. Conservation's manifest subservience to economic interests in this vital area seriously undermines the efficacy of wildlife law.

## Reforms

The dominance of economic interests generally and private property in particular within the planning ambit reflects the political consensus underpinning planning policy. This fails to accept nature conservation as a fundamentally important land use; a position which, if unchanged, will preclude successful introduction of the following suggested reforms. However, the continued growth of environmental awareness, as evidenced by increasing support for voluntary pressure groups,<sup>400</sup> is a cause for optimism.

Broadly speaking, conservation would be significantly enhanced if official conservation bodies were funded at a level consistent with full discharge of their duties according to the spirit of the law.<sup>401</sup> Equally beneficial would be a disinclination to interfere politically in issues that ought to be determined primarily on the basis of ecological factors. Such disinclination, however, is an unrealistic ideal.

This research has demonstrated that the planning mechanism is unworthy of the confidence placed in it by nature conservation law. The essential reason for this is that nature conservation as a land use has not yet attained a status capable of realistically challenging economic interests. What is required is a forum that fully recognises the importance of habitats to sustainable development, and makes decisions acknowledging the irretrievable consequences of habitat destruction. It would also be useful in planning cases to extend the right of appeal to interested third parties where environmental matters are at issue. This would ensure the

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<sup>400</sup> See R. Baggott, *Pressure Groups Today*, Manchester: Manchester University Press, 1995 @ p.54.

<sup>401</sup> See comments by NCC (interview) @ pp.62-63 above.

conservation interest had an opportunity to be fully represented, thus countering the inherent bias towards economic interests.<sup>402</sup>

A principal reason why habitats are inadequately protected under the law is the failure of the traditional property system to reflect ecological significance. Often marginal land, habitats are generally inexpensive to acquire and are therefore attractive to potential developers, who are not charged the true ecological cost of their destruction. Several suggestions have been made to rectify this, including the assertion of legal ownership in habitats themselves as tangible property.<sup>403</sup> Habitat exploitation would be controlled by law via a property-based recognition of ecological significance. The law of property would therefore ensure that harmful interference carried a reflective financial cost. Similarly, the reform of intellectual property laws -- which traditionally address the creations of man, not nature -- could assist habitat protection. Legal status for natural genetic material would provide an economic incentive to preserve habitats; a suggestion of Walden's<sup>404</sup> made in the context of the pharmaceutical industry, but which can be discussed in terms of nature conservation. The genetic material, in the form of fauna and flora present in habitats, could be recognised by law as having an economic value, which would then be accommodated in any decisions to interfere with habitats. This would require a change in the intellectual property system, which currently excludes from patentability plant and animal varieties occurring naturally.<sup>405</sup>

The rights of habitat exploitation could be vested in the NCC, so that where a notified harmful operation occurred, that body would be entitled to financial compensation. Thus, as an enhancement of the current system, planning permission would continue to override designation, but the developer would be liable to pay an additional sum to reflect the ecological cost of his actions -- funds

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<sup>402</sup> Such an initiative has been recently dismissed by the government; see written statement by Mr Raynsford, Minister for London and Construction; HC Deb. 30 July 1997, Col.409.

<sup>403</sup> I. Walden, 'Preserving biodiversity: the role of property rights', p.178; in: *Intellectual Property Rights and Biodiversity Conservation: an interdisciplinary analysis of the values of medicinal plants*, ed. T. Swanson; Cambridge: Cambridge University Press, 1995.

<sup>404</sup> Ibid @ p.182.

<sup>405</sup> See s. 1(3)(b) Patents Act 1977 and Art. 53(b) European Patent Convention, Cmnd. 7090, 1978.

that the NCC could then use to mitigate the damage, if appropriate, or enhance conservation elsewhere. A licensing system would serve to regulate the harmful interference and reciprocal compensation.

There are logistical difficulties in using the property system to protect habitats, not least in calculating the precise value to be attributed to factors that do not easily lend themselves to material valuation. What price ought to be put on uniqueness? How should one quantify irretrievable loss? Additionally, there are issues of formality, such as ownership of the property rights and identification of their breach.<sup>406</sup> Furthermore, the costs of establishing such a mechanism, and of funding the litigation that would be inevitable once designation carried significant pecuniary implications, are not to be underestimated. However, this is the price that must be paid if habitats are to be adequately protected in this avaricious age. There is a cynical, though sound, assumption underlying these particular reforms: that conservation will be more successful where there is a material advantage in furthering it, or where a material disadvantage accompanies its frustration.

Whatever means of protection are adopted, they must ultimately be guided by sustainability. Protection according to such a code could be absolute or indeed could provide for exceptional damage subject to compensation rules. This would depend upon how the code was drafted. It would be crucial to identify the minimum stock of natural assets consistent with sustainability;<sup>407</sup> this would form a national network of habitats in respect of which harmful development would be generally forbidden. It would be logical to extend protection on the European sites' model to current national sites, so that this new national network would include habitats currently designated as: SACs, SPAs, NNRs, MNRs, SSSI and Ramsar.

Stricter protective laws would demand great prudence in selecting designated sites. A useful approach is that proposed by Buckley,<sup>408</sup> whereby environmental limits are applied to the concept of Critical Natural Capital (CNC). This is an economic term, indicating that some aspects of natural capital ought to be

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<sup>406</sup> I. Walden, *op. cit.* @ p.194.

<sup>407</sup> P. Hopkinson & J. Bowers, *op. cit.* @ p.12

<sup>408</sup> P. Buckley, 'Critical Natural Capital: operational flaws in a valid concept'; ECOS 16 (3/4) 1995, 13; see pp.13-16.

protected fully; irrespective of other potential gains lost. For our purposes CNC would represent habitat deemed irreplaceable. Buckley suggests linking the level of habitat CNC to biodiversity, so once actual levels of irreplaceable habitat fall below the critical level determined by biodiversity, further loss would be forbidden. In terms of designation, the critical levels of capital for all habitat types would determine the area of the national network. Clearly there would be a need to continually review designated sites to ensure the national network continues to represent CNC.

An alternative reform would be retention of the present designation system and development criteria, but replacement of the local planning authority with a dedicated tribunal where important habitats are at stake. The involvement of what may be termed an 'Independent Conservation Tribunal' (ICT) would reflect the special considerations inherent in planning proposals affecting sustainability. Applications in respect of SSSI, NNRs, MNRs, European and Ramsar sites would be determined by the ICT; composed of ecological and planning experts. In this forum planning decisions would be free from the constraints of strict property value parameters; wider environmental considerations would be included within the ICT's terms of reference. Additionally, the tribunal's internal appeal mechanism would be open to interested third parties. Other habitats would continue to be dealt with under current planning procedure.

To combat the problem of extant planning permission granted in times of poor environmental awareness or before the ecological significance of a site became appreciated, all consent attaching to nationally important habitats would be re-assessed as currently is the case with European sites. Where that consent is revoked or amended, equity requires compensation to be paid to those affected. This will potentially be very substantial, but such a drain on public funds is justified by the need to ensure land use remains consistent with principles of sustainable development. EIA would be required for both re-assessment and all initial applications in which the ICT was involved. However, this would be carried out under the independent jurisdiction of the tribunal itself to ensure objectivity.

The ICT would be subject to judicial review; it would be prudent to secure the standing of all interested voluntary groups. This would ensure that planning

decisions affecting important habitats remained open to challenge by those with a tangible interest in the new environmental order. Legislation would be required to clarify locus standi; all bodies with interests in this field could be registered as having standing.<sup>409</sup> This, and the maintenance of such details, would be the responsibility of the ICT.

The tribunal would also be legally obliged to actively consult appropriate organisations, such as national groups with relevant expertise and local groups who express an interest. Breach of the consultation requirements would nullify the planning decision in question. Again, legislation would be required to effect this; either by amending the Town and Country Planning Acts or by provision within the Statute establishing the ICT.

The above reforms would greatly strengthen the protection of important habitats from harmful development. Whilst a rule of total inviolability for such sites would be ideal, this is not viable with pressure on land continuing to intensify as we approach the next century. In any event there are no means of preventing future amendment of such a rule even if it could be introduced. Ultimately, continued lack of popular support for total inviolability ensures that compromise must remain the guiding principle of planning debate.

However, permitting destruction only on grounds of human life and safety<sup>410</sup> is a viable and appropriate balance, and would place nature conservation in its rightful place within the land use planning context. Also, compulsory compensation measures for sites lost would ensure the maintenance of a national network. With all nationally and internationally significant habitats subject to one regime, the law governing their development would be simplified. Habitat protection would thus be liberated from the concept of hierarchy that is currently responsible for exerting disproportionate development pressure on less important sites.

In terms of European Commission enforcement, there are several areas that would benefit from reform. A re-drafting of Art.169 EC Treaty, so as to make the initiation of formal proceedings mandatory upon receipt of complaints, would

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<sup>409</sup> See K. Schiemann, *op. cit.* @ p.344.

<sup>410</sup> S. Owens, *op. cit.* @ p.19.

reduce the scope for political interference. Full publication of the Commission's decision as to formal notice or reasoned opinion would also be conducive to this. Additionally, broadening the scope of Art.138 EC Treaty,<sup>411</sup> so that those representing the wider public interest may also exercise advisory and supervisory powers in relation to the EU, would provide stronger environmental safeguards and empower citizens to fully utilise the law and institutions they financially support. However, it must be acknowledged that such reforms would require political influence and change at the highest national levels; they are currently unlikely to be implemented.

Reform is also required to alleviate the injustice caused by voluntary groups' inability to give the financial undertakings required by English courts for interim delay of development. In order to circumvent this barrier to enforcement, a central fund should be established as security for charitable litigants where planning consent is challenged and an interim order sought. Such an arrangement would have avoided the absurdity of Lappel Bank being destroyed during litigation that ultimately upheld the conservationists' case. The fund should be maintained from the public purse, with contributory arrangements in place per voluntary organisations. Such monies would not be used for litigation per se, merely to bridge the potential financial shortfalls that often frustrate interim relief sought by voluntary organisations -- major players in the environmental field.

With almost fifty years since the introduction of revolutionary post-war conservation legislation, it is time to undertake a wholesale review of this area. Society and its perceptions have altered much since Huxley's report of 1947; ever-increasing pressures upon fragile habitats make it all the more urgent that the correct balance between conservation and development is established and maintained. Legislative reform, and ultimately political will, are required to achieve this.

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<sup>411</sup> Which governs the make-up of The Assembly.



## Conclusion

This research ascertains the extent to which wildlife habitats are protected from harmful development via legal and regulatory processes. Is this an appropriate way to conceptualise, from a legal perspective, conservation's current plight? Certainly, as continued green-field depletion shows, habitats remain under incessant threat from development.<sup>412</sup> It is also apparent that their protection must necessarily depend upon the law; if not via continued ownership then by land use restrictions in conjunction with site designation. As State ownership or direct management on a sufficiently large scale has never been deemed practicable thus far in British conservation, the treatment of designated sites by the planning mechanism represents the obvious focal point for a topical assessment of nature conservation. Indeed, in a society of multifarious competing land uses, the success of conservation depends as much on planning acumen as ecological management; legal tools thus play a vital role.

The many strands that make up the legal aspect of nature conservation must be emphasised. In addition to protection from development, the law has a role to play in meeting threats from land management, pollution and interference. Similarly, within the wider planning context nature conservation is merely one of many competing uses. However, restrictions upon time and space limit this work to a narrow focus, within which it can do no more than examine a modest range of planning decisions. The conclusions presented here must be viewed in this context. The study was further limited by difficulties in gaining access to information held by local authorities; which were unable to grant interviews or positively assist in data gathering. Also, research in respect of cases subject to formal inquiry or litigation was frustrated by issues of confidentiality. Thus, original research has been restricted to records kindly made available by planning authorities, solicitors and voluntary organisations.

As this is an ambit in which competing claims for land use are routinely balanced, it is rarely possible to label a particular decision as being fundamentally erroneous. The political dimension inevitably clouds any conclusion to be drawn.

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See Annexes II & III.

Thus this paper, in presenting legal critique and suggested reforms, is based upon the assumption that the necessary political will to achieve change can be mobilised.

In highlighting the enduring nature of development as a habitat threat, I conclude that current legal and regulatory processes do not provide adequate protection. Radical reforms are required within this specialised area in order for habitat conservation to genuinely succeed.

The research raises several wider issues. Assuming inviolability of sites is untenable, under which circumstances should development be allowed; and how do we ensure that the rules defining these are adhered to in the spirit as well as the letter of the law? Within this convergence of disciplines, should the determining criteria for development be included in the designating code itself or be imposed by specific planning legislation? Does it matter where the impetus comes from? At a very basic level, interference in land planning for the benefit of wildlife must be justified. Whilst global species extinction is occurring at a much greater rate now than was the case pre-human times, it may be argued that this is simply the result of a new dominant species -- man; and that the law ought to be limited to regulating those activities that directly benefit man. In practical terms, the most pertinent issue is whether the public are prepared to pay for the controls conservation demands; both in direct financial terms and in the price of intensified demand for that land less strictly controlled. Such questions are political of course; hard choices must be made.

The contribution this work makes to the conservation--development debate is a summary of the reasons behind the continued failure of planning to adequately accommodate the nature conservation interest. Assuming political will is such as to give conservation a privileged position within the planning system, thus displacing the usual norms of private property dominance, this paper proposes the mechanics to achieve this.

Scope for further work in this field is apparent. The law on designation of European sites, post-Lappel Bank, strikes an appropriate balance. In view of the strict rules regulating subsequent development of such habitats, and the irrelevance of economic factors to designation, the focus of conflict may move to

the latter process itself, with ecological evidence being increasingly challenged. Indeed, if reforms such as those suggested above are implemented, it is submitted that this would be a natural consequence. In any event, it would be prudent to monitor the designation of European sites in the wake of Lappel Bank to ascertain the quality of such decisions, evidence relied upon and the development of challenge tactics. Also, research upon the exertion of political influence, particularly with regard to EU law, would provide useful information on this crucial dimension. An examination of the rule of law within the European environmental context is long overdue.

It is obvious that political acceptance of a high priority for nature conservation is the initial step towards an effective protective regime. Such a consensus must be based upon the recognition that the solution to the conflict between conservation and development lies in accepting that we cannot satisfy all existing and potential demand for the countryside. In other words, that it is futile to even attempt to match projected growth rates; this is increasingly apparent in the fields of rural housing and transport. As Lord Marlesford<sup>413</sup> has said, we must recognise that the scope and extent of the countryside, and thus its capacity, is limited. 'If we are to retain our countryside the government cannot seek to meet all the demands on it. The "predict and provide" approach to planning is unsustainable'. Consensus along such pragmatic lines would facilitate the legal changes which, as this paper shows, are necessary for effective habitat protection.

Meanwhile legal and regulatory processes must remain flexible, so as to ensure all land uses are accorded genuine and balanced consideration; minimising as far as possible the destruction of areas with ecological value. Until political consensus embraces the conservationist cause, the vigilance of voluntary organisations and their willingness to utilise protective law will be vital to retaining as much as possible of what remains of our natural heritage.

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HL Deb. 16 June 1993, Vol.546, Col.1635.

## **ANNEXES**

## **Annex I**

### **Abbreviations used in the Thesis**

AG	Advocate General
AONB	Area of Outstanding Natural Beauty
Art.	Article
BES	British Ecological Society
CBDC	Cardiff Bay Development Corporaion
CNC	Critical Natural Capital
C(NH)R 1994	The Conservation (Natural Habitats &c.) Regulations 1994
CPRE	Council for the Protection of Rural England
ECJ	European Court of Justice
EIA	Environmental Impact Assessment
EPA 1990	Environmental Protection Act 1990
ES	Environmental Statement
FoE	Friends of the Earth
GDO	General Development Order
ICT	Independent Conservation Tribunal
JNCC	Joint Nature Conservation Committee
LNR	Local Nature Reserve
MNR	Marine Nature Reserve
NC	Nature Conservancy
NCC	Nature Conservancy Council
NCO	Nature Conservation Order
NNR	National Nature Reserve
NPACA 1949	National Parks and Access to the Countryside Act 1949
NRIC	Nature Reserves Investigation Committee
PPG	Planning Policy Guidance Notes
Reg.	Regulation
RSC	Rules of the Supreme Court
RSPB	The Royal Society for the Protection of Birds
SAC	Special Area of Conservation
SCA 1981	Supreme Court Act 1981
SNC	Special Nature Conservation Order
SPA	Special Protection Area
SSSI	Site(s) of Special Scientific Interest
TCPA 1990	Town and Country Planning Act 1990
TCP(GDP)O 1995	Town and Country Planning (General Development Procedure) Order 1995
TCP(GPD)O 1995	Town and Country Planning (General Permitted Development) Order 1995
WACA 1981	Wildlife and Countryside Act 1981
WWF	World Wide Fund for Nature

## Annex II

### Damage to UK SSSI Caused by Activities given Planning Permission: 1990 - 1995

SEVERITY OF DAMAGE	YEAR	NUMBER OF CASES	TOTAL HECTARES
LONG-TERM	1990/1	9	1321
	1991/2	4	12
	1992/3	1	0.3
	1993/4	1	1
	1994/5	2	1.7
SHORT-TERM	1990/1	1	0.5
	1991/2	7	351
	1992/3	8	59.1
	1993/4	5	3.7
	1994/5	.	.
PARTIAL LOSS	1990/1	2	2
	1991/2	3	17.4
	1992/3	1	5
	1993/4	7	27.5
	1994/5	3	27.5
TOTAL LOSS	1990/1	-	-
	1991/2	-	-
	1992/3	-	-
	1993/4	-	-
	1994/5	-	-
UNCERTAIN	1990/1	-	-
	1991/2	-	-
	1992/3	-	-
	1993/4	-	-
	1994/5	1	2

### **Key:**

<b>Long-term Damage</b>	English Nature & Scottish Natural Heritage: 'lasting reduction in the special interest'; Countryside Council for Wales: 'special interest will take more than 15 years to recover'.
<b>Short-term Damage</b>	English Nature: 'special interest could recover'; Scottish Natural Heritage: 'special interest could recover within 15 years with favourable management'; Countryside Council for Wales: 'recovery in less than 15 years with favourable management'.
<b>Partial Loss</b>	Damage will result in denotification of part of the SSSI.
<b>Total Loss</b>	Damage will result in denotification of the whole SSSI.
<b>Uncertain</b>	Where it is impossible to identify a suitable damage category.

### **Sources:**

#### **Information supplied by the Joint Nature Conservation Committee.**

*NB. Between 1990 and 1995, statistics in respect of NCCs were correlated by the JNCC. This practice ceased after the year 1994-95, and the NCC and JNCC are currently developing and agreeing new common standards for, inter alia, damage reporting (these were expected to be in place by 1 April 1998). See **Annex III** for the latest damage statistics; compiled separately from data supplied by the individual NCCs.*

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### Annex III

#### Development Damage of English, Scottish and Welsh SSSI: 1996-1997

##### Development Damage of English SSSI: 1 April 1996 - 31 March 1997

SEVERITY OF DAMAGE	ACTIVITIES GIVEN PLANNING PERMISSION	
	Number of Cases	Total Hectares
<b>No Recovery (part of feature)</b>	2	1.9
<b>Long-Term</b>	2	2
<b>Unknown</b>	4	9.45

(Source: English Nature; 6th Report: 1996/97)

##### Key:

No Recovery (part of feature)

Long-Term

Unknown

Damage may result in denotification of part of the feature.  
Recovery of the special interest will take more than 3 years.  
Likelihood of recovery cannot be assessed.

##### Development Damage of Scottish SSSI: 1 April 1996 - 31 March 1997

SEVERITY OF DAMAGE	ACTIVITIES GIVEN PLANNING PERMISSION	
	Number of Cases	Total Hectares
<b>Short-term</b>	1	0 (linear feature of 300m)
<b>Long-term</b>	-	-
<b>Not likely</b>	1	2
<b>Unknown</b>	-	-

(Source: Scottish Natural Heritage & JNCC)



**Key:**

Short-term	Recovery of the special interest likely in 3 years or less
Long-Term	Recovery of the special interest will take more than 3 years.
Not Likely	Special interest is unlikely to recover

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**Development Damage of Welsh SSSI: 1 April 1996 - 31 March 1997**

SEVERITY OF DAMAGE	ACTIVITIES GIVEN PLANNING PERMISSION	
	Number of Cases	Total Hectares
Complete Loss	-	-
Partial Loss	-	-
Long-term	-	-
Short-term	1	2

(Source: Countryside Council for Wales & JNCC)

**Key:**

Complete Loss	Damage will lead to complete loss of the SSSI.
Partial Loss	Damage will lead to the loss of part of the SSSI.
Long-term	Recovery of the special interest will take longer than 15 years.
Short-term	Recovery of the special interest will take less than 15 years, given favourable management.

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